TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 619

WALTER G. QUERY, JOHN P. DERHAM, AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1941.

CERTIORARI GRANTED APRIL 14, 1942.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record from D. C. U. S., Eastern District of South Carolina	1	1
Caption (omitted in printing)	1	
Amended bill of complaint	2	1
Answer and return to amended bill of complaint	8	5
Exhibit "A"—Affidavit of P. M. Minus	13	9
Stipulation as to facts	14	9
Exhibit—Army Regulations No. 210-65 1 (omitted in printing)	16	
Exhibit—Army Regulations No. 210-65 C 3 (omitted in printing)	61	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 20, 1942.

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	Original	Print
Record from D. C. U. S., Eastern District of South Carolina—Continued		
Findings of fact and conclusions of law	71	11
Opinion, Lumpkin, J.	78	17
Decree	90	26
Notice of appeal	92	28
Stipulation designating record on appeal	93	28
Clerk's certificate (omitted in printing)	95	
Proceedings in U. S. C. C. A., Fourth Circuit	96	29
Docket entries	96	29
Per curiam opinion	98	31
Decree	101	32
Stipulation as to record for use on petition for writ of certiorari	102	32
Order staying mandate	103	33
Order authorizing clerk to use original transcript of record in making up record for use in the Supreme Court on application for writ of certiorari	104	34
Clerk's certificate (omitted in printing)	105	
Order allowing certiorari	106	34
Stipulation as to record for use on writ of certiorari	107	35

[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 425

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, S. C., and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, S. C., Complainants,

v.

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Defendants

AMENDED BILL OF COMPLAINT—Filed January 31, 1941

The complainants above named, by their amended Bill of Complaint, would respectfully show to the Court and allege:

1. At all times herein mentioned, the complainant, The United States of America, was and now is a corporation sovereign and a body politic.

2. The complainants, Henry D. Russell and William R. Tomy, are respectively, Major General and Major in the Army of the United States, and Commanding General and Post Exchange Officer at Fort Jackson, S. C.

3. The defendants, Walter G. Query, John P. Derham and John G. Richards are the duly appointed and acting members of the South Carolina Tax Commission and constitute said Tax Commission, and have as the principal place for the transaction of their official business the City of Columbia, County of Richland, in the State aforesaid, [fol. 3] and within the Eastern Judicial District of South Carolina.

4. The grounds upon which the jurisdiction of this Court depends are that this is a suit of a civil nature brought by

the United States of America, and that this Suit arises under the Constitution and Laws of the United States of America, and the amount in controversy herein exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

5. There are situated at the Navy Yard, in the County of Charleston, State aforesaid, the Post Exchange, Ships' Service Stores, and the Officers' Club. There are situated at Fort Moultrie, in the County of Charleston, State aforesaid, Post Exchanges and an Officers' Club. There are situated at the United States Marine Reservation at Parris Island, in the County of Beaufort, State aforesaid, Post Exchanges, a Non-Commissioned Officers' Club and an Officers' Club. There are situated at Fort Jackson, in the County of Richland, State aforesaid, Post Exchanges, Officers' Clubs, and Commissaries.

6. Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, imposes a license tax upon every person for the exercise of the privilege of engaging in selling within the State certain articles, among them being beer, wine, tobacco products, soft drinks, playing cards and candy. In addition to the license tax graduated in accordance with the volume of the sales, said Act, as amended, necessitates the procurement, for each place of business operated by the licensee of a license, the issuance of which is wholly within the discretion of the members of the South Carolina Tax Commission. The Act is implemented by a power of revocation of license and of seizure of the alleged illicit product together with the seizure of vehicles, not common carriers, bearing such product. A broad regulatory power is vested in the Commission whereunder it is privileged to enter upon the premises of a vender, whether a licensee or not, and examine his books and rec- [fol. 4] ords. The Commission is further empowered to promulgate rules and regulations under the Act, governing its enforcement, the violation of which will result in fine or imprisonment. In addition, those persons procuring licenses are required to maintain extensive files recording minutely the transactions allegedly embraced within the Act. In the instance of the sale of soft drinks, the licensee is required to maintain records of all such transactions for a period of not less that two years from the date of each such transaction.

7. Some of the commodities above mentioned are being purchased, sold and used by the Post Exchanges, Ships' Stores, Ship Service Stores, Clubs and Commissaries aforesaid, all of which are instrumentalities of the United States and/or voluntary unincorporated organizations of Army or Navy personnel, and the aforesaid commodities are distributed to, or sold to, and used by the personnel of the United States Army, Navy and Marine Corps only, in buildings and equipment furnished by the United States under the direction and supervision of the duly constituted officers of the United States Army or Navy and in accordance with rules and regulations promulgated by the Secretary of War and the Secretary of the Navy. None of the profits, if any, derived by the Post Exchanges, Ship Stores, Ship Service Stores, Clubs and Commissaries aforesaid accrue to any individual and the records and funds thereof are audited and checked by duly constituted officers of the United States Army or Navy, and any and all profits, if any, derived from the sale or use of any of the commodities above mentioned are used for the nourishment or recreation and entertainment of such personnel, thereby supplementing necessary appropriations made by the Congress from time to time for those purposes.

[fol. 5] 8. The said defendants claim that certain of the commodities sold by, distributed and used by the aforesaid Post Exchanges, Stores, Clubs and Commissaries are subject to the provisions of Act No. 574, Acts of the General Asembly of the State of South Carolina, as amended, under the provisions of Public No. 819, 76th Cong., 3d. Sess., and have threatened and are threatening to enforce the provisions of the aforesaid South Carolina Act, commencing with the 1st day of January, 1941, and have ordered that the said provisions of the said Act of South Carolina be applied to the purchase and sale of commodities by the aforesaid Post Exchanges, Stores, Clubs and Commissaries all of which, these complainants allege, is contrary and repugnant to the provisions of the Constitution of the United States and in interference with the activities of the United States Government, since the imposition and collection of none of the taxes imposed by Act 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, are consented to by Public No. 819, 76th Cong., 3rd Sess., in the case of the Post Exchanges, Stores, Clubs and Com-

missaries aforesaid, or in the case of any voluntary unincorporated organizations of Army or Navy personnel. The complainants claim that the aforesaid commodities sold by, distributed and used by the aforesaid Post Exchanges, Stores, Clubs and Commissaries are not subject to the provisions of the aforesaid South Carolina Act.

9. Unless the enforcement of the said South Carolina Act be enjoined, the complainants and the Army and the Navy personnel at the aforesaid Post Exchanges, Stores, Clubs and Commissaries will be subjected to repeated unlawful proceedings and interference in the performance by them of their lawful duties and functions. The complain- [fol. 6] ants' property will be subjected to unlawful invasion, seizure and confiscation, to the complainants' immediate, permanent and irreparable detriment and loss.

10. The complainants are without any plain, speedy and efficient remedy, either at law or in equity, against the defendants, in the Courts of the State of South Carolina for the aforesaid invasion and attempted invasion against the rights of the complainants, and are in fact without any remedy at law in the premises, and only by a suit in equity and by the injunctive processes of this Court can they be fully protected from the illegal interference by the defendants with the lawful functions performed by the complainants and the Army and Navy personnel at the aforesaid Post Exchanges, Stores, Clubs and Commissaries. Only by the granting of injunctive relief can the confusion, uncertainty, hardship and multiplicity of suits which will be engendered by the enforcement and attempted enforcement of the South Carolina Act by the defendants, be prevented and only in a Court of equity can the necessary relief be adequately obtained. It is therefore necessary to obtain from this Court a Decree enjoining the defendants from enforcing the provisions of the said South Carolina Act as against the aforesaid Post Exchanges, Ships' Stores, Ship Service Stores, Clubs and Commissaries, and that they be likewise enjoined from the enforcement of the said Act against the aforesaid Post Exchanges, Stores, Clubs and Commissaries pending the determination of this proceeding.

Wherefore, complainants pray that the defendants as members of and constituting the South Carolina Tax Commission and their agents, servants and employees be per-

manently enjoined and restrained from enforcing the pro-
[fol. 7] visions of Act No. 574, Acts of 1928, of the General Assembly of the State of South Carolina, as amended, against the Post Exchanges, Ships' Stores, Ships Service Stores, Clubs and Commissaries, as aforesaid, and the purchase, sale or use by them of the commodities enumerated in the aforesaid South Carolina Act, and that this Court adjudge that the provisions of the said South Carolina Act are not applicable to the purchase, sale or use by the aforesaid Post Exchanges, Stores, Clubs and Commissaries, and that, pending the final hearing and determination of this action, this Court grant an interlocutory injunction restraining the defendants, their agents, servants and employees from doing or causing to be done any of the things as to which a permanent injunction is herein prayed for, and for such other and further relief as to the Court may seem proper.

United States of America. Major General Henry D. Russell, United States Army. Major William R. Tomy, United States Army. By C. N. Sapp, United States Attorney, Attorney for Complainants.

[fol. 8] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 425

[Title omitted]

ANSWER AND RETURN TO AMENDED BILL OF COMPLAINT—Filed January 31, 1941

The Defendants above named, for their answer and return to the amended bill of complaint, respectfully show to the Court:

1. Admit all of the allegations contained in paragraph one (1) of the amended bill of complaint.

2. Admit all of the allegations contained in paragraph two (2) of the amended bill of complaint.

3. Admit all of the allegations contained in paragraph three (3) of the amended bill of complaint.

4. Admit all of the allegations contained in paragraph four (4) of the amended bill of complaint.

5. Admit all of the allegations contained in paragraph five (5) of the amended bill of complaint, and allege in addition to the organizations therein alleged to be operated, there are other Officers' Clubs, Post Exchanges, and similar [fol. 9] organizations operating outside of the Charleston Navy Yard, Fort Jackson, and Parris Island, S. C., to-wit, on Hampton Avenue, in the City of Columbia, S. C., in the City limits of Charleston, S. C., and in Spartanburg County, South Carolina.

6. Admit so much of the allegations contained in paragraph six (6) of the amended bill of complaint as allege that under the laws of South Carolina the commodities enumerated in said paragraph are subject to the sale or use tax; also admit that these articles are being sold at Post Exchanges, Ships' Stores, Clubs and Commissaries located in South Carolina; that said organizations are operated under the regulations of the army and navy department; deny that any of the said organizations are instrumentalities of the United States; deny that they sell and distribute such commodities to the personnel only, and allege that private citizens are permitted to purchase these commodities from the various organizations just as they would purchase them from any other mercantile establishment in South Carolina, and also allege that it is contrary to Federal law for beer, wine or intoxicating liquors to be sold or distributed on property used for military purposes. None of the money necessary to operate these organizations is furnished by the United States, none of the profits inure to the United States, all profits, if any there be, are enjoyed by the personnel owning and operating such organizations. Some of the profits are used for the purpose of purchasing equipment to be used in said places of business, and other equipment is loaned or furnished by persons or corporations from whom the stock of merchandise is secured. Defendants deny that they have attempted to require the procurement of a license for each place of business above enumerated, the Act of Congress only permitting [fol. 10] the State to collect its sales, use, and income tax

on Government reservations. Some of the profits are used for the purpose of paying salaries of civilian employees who are hired by such organizations to work in and about the business places of these organizations, just as any other mercantile establishment is operated. There is no Act of Congress requiring or permitting the operation of these Post Exchanges, or similar organizations; but, on the contrary, they are operated under the permission of superior officers of the various departments. Affidavit of P. M. Minus, Director of the License Tax Division of South Carolina Tax Commission, is hereto attached, marked Exhibit "A", and made a part of this answer and return.

7. Deny each and every allegation contained in paragraph seven (7) of the amended bill of complaint, except that taxable commodities are sold in the Post Exchanges, or similar organizations; deny that the defendants are attempting to collect any tax from Commissaries, or Ships' Stores, these two being admittedly stores operated by the United States; deny that Post Exchanges, Ship Service Stores, Officers' Clubs, or noncommissioned Officers' Clubs, are instrumentalities of the United States, regardless of where operated; deny that the commodities in question are distributed to, sold to, and used only by the personnel of the army, navy and marine corps, and allege that under the regulations provided for the operation of these stores many civilians are permitted to make purchases therefrom; and, in addition thereto, other civilians not connected in any wise with the reservations are permitted to make purchases there- [fol. 11] from; allege that the profits, if any, derived from the operating of these organizations do accrue to the membership of the organizations collectively; that if any of the commodities sold or distributed therefrom were necessary for the personnel to have in order that the personnel render proper services to the United States, such commodities would be furnished by the United States.

8. Admit that defendants claim that taxable commodities sold by, distributed and used by the aforesaid organizations, are subject to the tax provided in Act No. 574, Acts of the General Assembly of South Carolina, as amended; admit that defendants are threatening to enforce the provisions of the aforesaid Act, but deny that defendants have threatened to enforce the provisions of this Act

against the Commissaries, or Ships' Stores; deny that the enforcement of this Act against the aforesaid organizations would in any wise interfere with the activities of the United States, or would be in any wise repugnant to any provision of the Constitution of the United States. Defendants allege that none of these organizations are created by Act of Congress and are, therefore, not instrumentalities of the United States, they being non-instrumentalities of the United States, no consent of Congress is necessary to permit the State to levy its lawful tax thereon, the territorial immunity having been removed by Public Act No. 819, 76th Congress.

9. Admit that this Court has jurisdiction to determine the matters here in controversy and to determine whether or not the action of defendants, or the Statute under which they are attempting to proceed are in violation of the Constitution of the United States; deny that there is any attempt to enforce the South Carolina Act against Commissaries or Ships' Stores, and deny that the enforcement of [fol. 12] this Act against Post Exchanges, and similar organizations, will interfere in any manner in the performance by them of their lawful duties and functions. Deny that complainant, United States of America, is involved in any way, or that its property will be subjected to unlawful invasion by the enforcement of the South Carolina Act, inasmuch as the United States owns none of the property involved, it being the sole property of the organizations.

10. Admit that complainants are without any plain, speedy or efficient remedy at law; deny that the United States has any interest in this proceeding and that there will be no interference with the United States by the application of the South Carolina Act to Post Exchanges, and similar organizations, and allege that a bond should be required to protect the State against any loss, pending a final decision in this matter.

Wherefore, defendants, having fully answered and made return to the amended bill of complaint, pray that the same be dismissed, that the temporary restraining order be dissolved, and for such other and further relief as to the Court may seem just and proper.

(S.) John M. Daniel, Attorney General for South Carolina; (S.) Claude K. Wingate, Attorneys for Defendants.

[fol. 13] EXHIBIT "A" TO ANSWER AND RETURN

STATE OF SOUTH CAROLINA,
County of Richland:

AFFIDAVIT OF P. M. MINUS

P. M. Minus, first being duly sworn, deposes and says:

That he is Director of the License Tax Division of South Carolina Tax Commission, and as such has direct supervision of the collection of all licenses, sales, and use taxes levied under the revenue laws of South Carolina.

That some time ago information and complaints came to him that Post Exchanges at Fort Jackson, and other similar organizations, in South Carolina, were making sales in large quantities of tobacco products, and other taxable commodities, to private citizens. Acting upon these complaints and this information, he, along with an employee of his Department, drove out to Fort Jackson and parked in front of one of these Post Exchanges and saw many civilians going in the Post Exchange and purchasing quantities of cigarettes and smoking tobaccco which they carried off with them, and that he also saw taxi drivers carrying off cigarettes by the carton.

That he also observed many civilians purchasing and consuming soft drinks and beer in said Post Exchange.

(S.) P. M. Minus.

Sworn to before me this 31st day of January, A. D., 1941. A. B. Craig (L. S.), Notary Public for South Carolina. (Seal.)

[fol. 14] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

[Title omitted]

STIPULATION AS TO FACTS—Filed April 1, 1941

It is hereby agreed and stipulated by and between the parties hereto as follows:

1. That the Commissaries and Ships' Stores mentioned and described in the bill of complaint are instrumentalities

of the Federal Government, and the Court is requested to so find.

2. That the organization, function and activities of the Post Exchanges of the United States Army mentioned in the bill of complaint in this case are as determined and prescribed in Army Regulations AR 210-65 C. 1 and 3; and that the purpose of the activities of the Army Post Exchanges mentioned in the bill of complaint are as therein described; that the ownership, possession and control of the funds of the Army Post Exchanges mentioned in the bill of complaint are as determined in the above mentioned Army Regulations and by Army Regulations AR 210-50 1-2, all of which are attached hereto as a part hereof.

3. That the Marine Corps Post Exchanges, and the Ships' Service Stores mentioned in the complaint bear the same relationship respectively to the Marine Corps, and the United States Navy that the Army Post Exchanges bear to the United States Army, and that, if it be determined that the Army Post Exchanges mentioned in the bill of [fols. 15-70] complaint are instrumentalities of the Government, then the Court is requested to find that the Marine Corps Post Exchanges and the Ships' Service Stores mentioned in the bill of complaint are also instrumentalities of the Federal Government, it being understood that if it be determined that the Army Post Exchanges mentioned in the bill of complaint are not Federal instrumentalities, then a similar finding in the case of the Marine Corps Post Exchanges and the Ships' Service Stores should be made.

4. It is further stipulated and agreed that in the event that the Court finds that the United States Army Post Exchanges mentioned in the bill of complaint are instrumentalities of the Federal Government, then a similar finding is to be made by the Court with respect to the Officers' Clubs and Noncommissioned Officers' Clubs mentioned in the complaint; and if the Court should find that the United States Army Post Exchanges mentioned in the bill of complaint are not instrumentalities of the Federal Government, then a similar finding is to be made by the Court with respect to the Officers' Clubs and Noncommissioned Officers' Clubs.

5. It is further stipulated and agreed that if the Court shall find that the plaintiffs are entitled to have the defendants enjoined and restrained from collecting the taxes as to the activities of the Post Exchanges, that they also be enjoined and restrained from collecting the taxes as to the Marine Corps Post Exchanges, Ships' Service Stores, the Officers' Clubs and Noncommissioned Officers' Clubs.

6. It is further stipulated and agreed that the allegations in the complaint relative to the cafeteria at the Navy Yard at Charleston, S. C., shall be deemed to have been eliminated therefrom.

7. It is agreed and stipulated that this stipulation and the documents attached hereto as a part hereof constitute all the evidence in this case.

C. N. Sapp, United States Attorney, Attorney for the Plaintiffs. John M. Daniel, Attorney General of S. C.; Claude K. Wingate, Attorney- for the Defendants.

Columbia, S. C., January 31, 1941.

[fol. 71] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[Title omitted]

Findings of Fact and Conclusions of Law—Filed April 1, 1941

FINDINGS OF FACT

The Court makes the following findings of fact:

1. The Complainants, Henry D. Russell and William R. Tomy, are respectively Major General and Major in the Army of the United States and Commanding General and Post Exchange Officer at Fort Jackson, South Carolina.

2. The Defendants, Walter G. Query, John P. Derham and John G. Richards are the duly appointed and acting members of the South Carolina Tax Commission and con-

stitute said Tax Commission, and have as the principal place for the transaction of their duties the City of Columbia, County of Richland, in the State aforesaid, and within the Eastern Judicial District of South Carolina.

3. There are situated at the Navy Yard, in the County of Charleston, State aforesaid, the Post Exchange, Ships' Service Stores, and Officers' Club. There are situated at [fol. 72] Fort Moultrie, in the County of Charleston, State aforesaid, Post Exchanges and an officers' Club. There are situated at the United States Marine Reservation at Parris Island, in the County of Beaufort, State aforesaid, Post Exchanges, a Non-commissioned Officers' Club and an Officers' Club. There are situated at Fort Jackson, in the County of Richland, State aforesaid, Post Exchanges, Officers' Clubs and Commissaries.

4. Under Army Regulations No. 210-65, promulgated by the Secretary of War, under the authority given to him by Congress, the Commanding Officer of each post is directed to establish and maintain a Post Exchange whenever there is need for it, membership in which is limited to companies, troops, batteries, aero squadrons or other similarly organized units and detachments.

5. The Commanding Officer of each Post Exchange has complete jurisdiction over the conduct of all Exchanges within his command subject to the general supervision of superior authority and is held strictly responsible for their efficient operation and for the enforcement of exchange regulations.

6. Under the Army Regulations sales are made only to officers and enlisted men of the Regular Army, Army nurses, contract surgeons, members of the Reserve Corps while on active duty, officers and enlisted men of the National Guard when in federal service, civilian employees authorized for service abroad, having a status recognized by the War Department as part of an expeditionary force, and civilians employed or serving at military posts.

7. The primary purposes of an Exchange are to supply troops at the lowest possible prices with articles or ordinary use, wear and consumption not supplied by the Government, to afford the means of rational recreation and [fol. 73] amusement, and through exchange profits to pro-

vide, when necessary, the means for improving the company messes.

8. The Commanding Officer of a Post Exchange is charged with the maintenance of recreational athletics, entertainments, service clubs, libraries, and community cooperation.

9. The Post Exchange is governed by a council consisting of a Post Exchange Officer and Commanding Officer of each company, battery, hospital detachment, or similar organization.

10. The Post Exchange Officer is detailed by the Commanding Officer and receives no compensation for his services.

11. Under the Regulations of the Secretary of War the duties imposed upon officers in the management of exchange affairs are as binding upon them as any other duty which they may be assigned under competent military authority.

12. Five per cent of the profits, if any, are set aside as a fund which is divided among the members of the exchange, that is, the companies, troops, batteries, squadrons or units and detachments, and not any individuals, and the balance is set aside as a portion of the recreation fund for the laying out, preparing and cultivating gardens, for the purchase of books, newspapers, periodicals, stationery, and similar articles for the exchange library, gymnastic appliance, and prizes for athletic sports. These funds belong to no particular individual and even the part which is set aside for the individual organizations having membership in the Post Exchange is held by such members in trust subject to the orders of the Secretary of War and to congressional enactments.

13. In 1913 Congress required balances of Post Exchange funds amounting to $298,068.00 to be covered into the Federal Treasury after the military organizations who held these funds were disbanded.

[fol. 74] 14. Buildings have been constructed and recreational facilities set up at posts and are maintained from funds made available by the War Department. The amount of funds so made available is normally dependent on the

amount included in the item "Military Post Exchanges" in the appropriation act for the fiscal year.

15. Commencing with the year 1902 Congress made appropriations practically each year under the title "Military Post Exchange", and the amounts so appropriated for buildings alone aggregates twelve million dollars besides large sums allotted for this purpose from various emergency funds.

16. Where Post Exchange buildings have not been provided from funds otherwise available, the Commanding Officer is authorized to construct temporary buildings by the labor of troops and to use the necessary teams and such tools, windows, sashes, doors, and other material as can be spared by the Quartermaster Corps.

17. The Quartermaster is authorized to sell to the Exchange at cost any subsistence stores except exceptional articles, to furnish heating and suitable apparatus therefor for exchange rooms and buildings, and to provide supplies for interior and exterior illumination.

18. Messages on Post Exchange business over telegraph, radio, and cable lines owned and operated by the War Department may be transmitted without charge and penalty envelopes may be used in conducting Post Exchange correspondence.

19. In 1928 the Legislature of South Carolina passed Act No. 574, under the provisions of which a license tax is imposed on every person selling the articles referred to in the Complaint and requiring such person to secure a license which may be issued or revoked by the defendants.

[fol. 75] 20. Act No. 574, as amended, provides that the commodities named therein, for the privilege of carrying on such business, shall be subject to the payment of license tax which shall be measured by and graduated in accordance with the volume of sales by the person obtaining such license.

21. The Act further provides that the person engaged in the business of buying, selling or distributing the articles therein referred to without having secured the required license shall be guilty of a misdemeanor, that the license taxes shall be paid by affixing stamps at the time and in the

manner set forth in the Act, and that if such commodities are found at the time set forth in the Act in the possession of the licensed person without stamps affixed thereto, they shall become contraband and subject to be seized by the defendants, and that the vehicle owned by anyone other than a common carrier used for the transportation for the purpose of sale or unstamped commodities shall also be subject to confiscation.

22. The Act further provides that the Tax Commission and its agents shall have the power to enter upon the premises of any taxpayer and to examine any books, papers, records or memoranda bearing upon the amount of taxes to be paid, to secure other information directly or indirectly concerned in the enforcement of the provisions of the Act, and directs that such records as may be required by the Tax Commission shall be kept by the taxpayer and shall at all times be subject to the inspection of the Commission and its agents, and imposes penalties for the failure to keep any such records and for refusing to submit the same for the inspection of the Commission and its agents.

23. Army Regulations specify what books and records shall be kept by Post Exchanges and the manner of auditing the same.

[fol. 76] 24. After the passage of Act No. 574 in 1928 the South Carolina Tax Commission did not undertake to enforce the provisions thereof in respect to the agencies and organizations set forth in the complaint herein, but since the passage of Public No. 819, 76th Cong., 3d Sess., the defendants have ruled that the provisions of Act No. 574 passed by the Legislature of South Carolina in 1928, are applicable to the agencies and organizations specified in the complaint and have notified such organizations and agencies that the provisions of such Act would be enforced as against them and have directed its agents to enforce the same and have threatened and are threatening to continue to enforce and to attempt to enforce the same.

Conclusions of Law

And the Court sets forth the following as its conclusions of law:

1. That the Post Exchange at Fort Jackson, South Carolina, is an instrumentality of the Federal Government.

2. That the Post Exchange at Fort Jackson, South Carolina, and its transactions are not subject to state taxation.

3. That the taxes imposed by Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, are inapplicable to the Post Exchange at Fort Jackson, South Carolina, or its transactions.

4. That Congress, by Act of October 9, 1940, Public No. 819, 76th Cong., 3d Sess., did not subject the Post Exchange at Fort Jackson, South Carolina, to state, sales, use or income taxation.

5. That the complainants have no plain, speedy, and efficient remedy at law or in equity in the courts of the state of South Carolina.

[fol. 77] 6. That the complainants are entitled to a permanent injunction restraining the defendants as members of and constituting the South Carolina Tax Commission and their agents or employees from enforcing or attempting to enforce the provisions of Act No. 574, as amended, with respect to the Post Exchange at Fort Jackson, South Carolina, or its transactions.

7. That the complainants are entitled to the declaratory judgment prayed for in the Amended Bill of Complaint.

(S.) John J. Parker, United States Circuit Judge, Fourth Circuit. Johnson J. Hayes, United States District Judge for Middle District of North Carolina. Alva M. Lumpkin, United States District Judge for the Eastern and Western Districts of South Carolina.

This the 31st day of March, 1941.

[fol. 78] DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[File endorsement omitted]

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, individually and as Post Exchange Officer, Fort Jackson, South Carolina, Complainants,

v.

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as members of and constituting the South Carolina Tax Commission, Defendants

(Argued January 31, 1941. Decided March 31, 1941.)

Before Parker, Circuit Judge, and Hayes and Lumpkin, District Judges

Claud N. Sapp, United States Attorney, (Louis M. Shimel, Assistant United States Attorney, Samuel O. Clark, Jr., Assistant Attorney General, Sewall Key, Andrew D. Sharpe, Berryman Green, Special Assistants to the Attorney General, on Brief) for Plaintiffs, and

Honorable John M. Daniel, Attorney General for South Carolina, and Claude K. Wingate, General Counsel, South Carolina Tax Commission, for Defendants.

OPINION—Filed April 1, 1941

[fol. 79] LUMPKIN, District Judge:

This is an action brought by the United States, and the Commanding General and Post Exchange Officer of Fort Jackson, South Carolina, for a declaratory judgment and to enjoin the members of the South Carolina Tax Commission from enforcing the provisions of Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, with respect to the activities of the United States Army Post Exchange at Fort Jackson.

By stipulation of the parties, it was agreed that if the complainants should prevail with respect to post exchanges,

the relief granted by the Court is to be applicable to the Marine Corps post exchanges, ships' stores, officers' clubs and non-commissioned officers' clubs described in the amended bill of complaint.

A District Court of three Judges heard the case on complainants' application for interlocutory and permanent relief, and it was agreed that the hearing should be on the merits for a final decree.

The action is brought under Section 274d of the Judicial Code, as amended, and under Section 266 of the Judicial Code, interlocutory and permanent injunctions being sought by the complainants.

The question involved is whether under the provisions of Public Act No. 819, 76th Cong., 3d Sess., hereinafter referred to as the Federal Act, the taxes imposed by Act No. 574 of the Acts of 1928 of the General Assembly of the State of South Carolina, as amended, hereinafter referred to as the State Statute, are applicable to and collectible from the United States Army Post Exchange at Fort Jackson, Richland County, South Carolina.

The material facts as they appear in the pleadings and stipulation of the parties are as follows:

[fol. 80] As set forth in the Findings of Fact this day filed herein the Post Exchange at Fort Jackson is created and functions under United States Army Regulations No. 210-65, C-1, and C-3, promulgated by the Secretary of War, under the authority given him by Congress. By these regulations the commanding officer of each post is directed to establish and maintain a post exchange whenever there is need for it, membership in which is limited to companies, troops, batteries, aero squadrons, or other similarly organized units and detachments. The commanding officer of each army post has complete jurisdiction over the conduct of all post exchanges within his command, subject to the general supervision of superior authority, and is held strictly responsible for their efficient operation and for the enforcement of army regulations applicable to post exchanges. Under these regulations sales are made only to officers and enlisted men of the regular army, army nurses, contract surgeons, members of the Reserve Corps while on active duty, officers and enlisted men of the National Guard when in federal service, civilian employees authorized for service abroad, having a status recognized by the

War Department as part of an expeditionary force, and civilians employed or serving at military posts.

The primary purposes of an exchange are to supply troops at the lowest possible prices with articles of ordinary use, wear and consumption not supplied by the Government, to afford them means of rational recreation and amusement, and through exchange profits to provide, when necessary, the means for improving the company messes. The commanding officer of each army post is charged with the maintenance of recreational athletics, entertainments, service clubs, libraries, and community cooperation which are to be centered about the post exchange which provides the financial support necessary for their maintenance. The [fol. 81] post exchange is governed by a council consisting of a post exchange officer and commanding officer or each company, troop, battery, hospital detachment, or similar organization participating therein. The post exchange officer is detailed by the commanding officer and receives no compensation for his services other than his regular army pay.

Under the Regulations of the Secretary of War the duties imposed upon officers in the management of exchange affairs are as binding upon them as any duty to which they may be assigned under competent military authority. Five per cent of post exchange profits, if any, are set aside as a fund which is divided among the organizations which constitute the membership of the exchange, that is, the companies, troops, batteries, squadrons or units and detachments, and not individuals, and the balance is set aside as a portion of the recreation fund for the laying out, preparing and cultivating gardens, for the purchase of books, newspapers, periodicals, stationery, and similar articles for the exchange library, gymnastic appliances, and prizes for athletic sports. These funds belong to no particular individual and those portions which are set aside for the participating organizations having membership in the post exchange are held by such member organizations in trust, subject to the orders of the Secretary of War or congressional command. Where post exchange buildings have not been provided for from funds otherwise available, the commanding officer is authorized to construct temporary buildings by the labor of troops and the use of necessary teams, and such tools, windows, sashes, doors and other material

as can be spared by the Quartermaster Corps of the army. The Post Quartermaster is authorized to sell to the exchange at cost any subsistence stores except exceptional articles, to furnish heating and suitable apparatus therefor for post exchange rooms and buildings, and to provide supplies for interior and exterior illumination. Messages on post exchange business over telegraph, radio, and cable lines owned and operated by the War Department may be transmitted without charge, and penalty envelopes may be used [fol. 82] in the mails in conducting post exchange correspondence. United States Army Regulations specify what books and records shall be kept by post exchanges and the manner of auditing them.

The State Statute imposes a license tax upon every person for the exercise of the privilege of engaging in selling within the State certain articles among them being beer, wine, tobacco products, soft drinks, playing cards, and candy. In addition to the license tax graduated in accordance with the volume of the sales, that Statute necessitates the procurement by the licensee of a license for each place of business operated by him. The Statute is implemented by a power of revocation of license and of seizure of the alleged illicit product together with the seizure of vehicles, not common carriers, bearing such product. A broad regulatory power is vested in the Commission whereunder it is privileged to enter upon the premises of a vendor, whether a licensee or not, and examine his books and records. The Commission is further empowered to promulgate rules and regulations under the Statute, governing its enforcement, the violation of which will result in fine or imprisonment. In addition those persons procuring licenses are required to maintain extensive files recording minutely the transactions allegedly embraced within the Statute. In the instance of the sale of soft drinks the licensee is required to maintain records of all such transactions for a period of not less than two years from the date of each such transaction.

Subsection (a) of Section 1 of the Federal Act provides that no person shall be relieved from liability for payment of any sales or use tax levied by any State on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area. The Act further provides as follows:

[fol. 83] "Sec. 3 (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

"(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations or Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy."

The defendants have since January 1, 1941, the effective date of the Federal Act, insisted that the activities of the Post Exchange in reference to the articles enumerated in the State statute are subject to the provisions of that Statute, and have threatened to enforce the provisions of that Statute with respect to post exchange activities at Fort Jackson. The complainants, however, have refused to admit the applicability of the tax imposed by the State Statute, and have directed that no license taxes upon the activities of the Post Exchange be paid to the South Carolina Tax Commission.

We are of opinion that the provisions of the State Statute are not applicable to the activities of the Post Exchange, that the Federal Act does not give to the defendants the power to enforce such provisions against such activities, and that the order of the defendants to enforce the provisions of the State Statute against such activities and their threat to enforce and their attempts to enforce the same constitute an interference with the activities of the United States, and are unconctitutional.

In the case of *U. S. v. Query, et al.*, 21 Fed. Supp. 784, this Court, sitting as a three-Judge Court, passed upon the question of the relationship of a post exchange of the Civilian Conservation Corps with the Federal Government and, holding that a Civilian Conservation Corps post exchange was a federal instrumentality, enjoined the defendants from enforcing the provisions of the State Statute herein involved as against the post exchange. It is contended that [fol. 84] while the Civilian Conservation Corps Post Ex-

change was created by statute, there is no Act of Congress specificially authorizing the creation and operation of Post Exchanges by the United States Army. A study of the history and character of both exchanges leads to the conclusion that there is no difference in their respective functions. At the hearing upon the Bills to establish a Civilian Conservation Corps before the Committee on Education and Labor, U. S. Senate, 75 Cong. 1st Sess., the Director of Emergency Conservation Work recommended a provision in the Bill authorizing the creation of post exchanges "just like the post exchanges the Army possesses" in order that such post exchange should be "on the same basis as the post exchanges on the Army reservation." (Senate Hearings before the Committee on Education and Labor, on S. 2102, 75th Cong., 1st Sess., pp. 48-49.) In compliance with this request Congress provided the statutory authority asked for by the Director for the creation and operation of Civilian Conservation Corps Post Exchanges.

In 1870, (Act of July 15, 1870, c. 294, 16 Stat. 319) Congress directed that the Secretary of War should prepare a system of general regulations for the administration of the affairs of the Army, which, when approved by Congress, should be enforced until altered or revoked by the same authority. In 1875 (Act of March 1, 1875, c. 115, 18 Stat. 337) Congress repealed that part of the Act which required that such regulations be reported to and approved by that body, and authorized the President to make and publish regulations for the government of the Army in accordance with existing laws. On July 25, 1895, post exchanges were established under regulations promulgated by the Secretary of War. Those regulations have the force of law. *United States v. Freeman*, 3 How. 556, 566; *Gratiot v. United States*, 4 How. 80, 118.

[fol. 85] Congressional approval of the creation and operation of Army Post Exchanges will be found in the several appropriation Acts, commencing with the year 1903 until the present time. In 1903 (Act of March 2, 1903, c. 975, 32 Stat. 927, 937-38), Congress appropriated $500,000.00 "for continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement rooms, and gymnasium, to be expended in the discretion of and under the direction of the

Secretary of War", and every year thereafter various appropriations for the same purposes were made. In 1933 and 1934 Congress required the balances of disbanded organization funds, amounting to $298,068, which had been derived from post exchange activities covered into the federal treasury. (Act of March 4, 1933, c. 281, 47 Stat. 1573; Act of June 26, 1934, c. 756, 48 Stat. 1224, 1229.)

By the enactment of these statutes from time to time, Congress recognized and validated the *the* functions of the post exchanges, and in effect confirmed and approved the regulations promulgated by the Secretary of War. *Swayne and Hoyt Ltd. v. United States*, 300 U. S. 297.

Support for the views herein expressed is found in the decisions of the Court of Claims and in the long continued administrative practice.

In *Dugan v. United States*, 34 C. Cls. 458, and in *Woog. Admr. v. United States*, 48 C. Cls. 80, the Court of Claims held that a post exchange was an instrumentality of the Federal Government, engaged in the performance of a governmental function. In the *Dugan Case*, the Court held that a post exchange was not liable for federal internal revenue special taxes as a retail liquor dealer, and in the *Woog Case*, the Court held that the failure of a post exchange officer to properly account for post exchange funds [fol. 86] justified a deduction from the pay of such post exchange officer.

The President of the United States, the heads of the various departments of the United States, to whose opinions the courts always give great weight, *N. Y. ex rel. Rogers v. Graves*, 299 U. S. 401, 406, 407, including the Attorney General, the Comptroller of the Treasury, the Comptroller General, the Postmaster General, The Secretary of War, the Secretary of the Navy, and the Commissioner of Internal Revenue, have in many instances held that post exchanges and their predecessors were federal instrumentalities. (Executive Order 6390 February 6, 1934.) (Cir. 54 W. D. 1932.) (21 Comp. Dec. 109; 3 Comp. Gen. 518.) (Cir. 48, W. D., 1933.) (22 Op. Atty. Gen. 426, 428.)

By Executive Order dated February 6, 1934, the President states that "This order shall apply to and include all vehicles owned and operated by the United States Government and by legally authorized instrumentalities thereof, such as post exchanges, company and recreational organiza-

tions of the Army and Marine Corps, and ship's service activities of the Navy; the Panama Railroad Co., and the Republic of Panama," and the Supreme Court held in *N. Y. ex rel Rogers v. Graves, supra,* that the Panama Railroad Company, placed by this order in the same category as post exchanges, was an instrumentality of the United States.

The parties hereto have stipulated that if the complainants should prevail with respect to the issues raised as to the Post Exchange, then the relief granted by the Court should be applicable to the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-Commissioned Officers' Clubs described in the amended bill of complaint.

The Court, therefore, holds and declares that the findings herein and the conclusions reached apply to all of the aforementioned Post Exchanges, Ships' Stores, Officers' Clubs [fol. 87] and Non-Commissioned Officers' Clubs.

The issue was raised herein as to whether or not this matter was properly triable before a Three-Judge Court, and this issue should be decided in this opinion.

This is an action for a declaratory judgment and for injunctive relief against an order of the South Carolina Tax Commission applying the provisions of Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, to the Post Exchange at Fort Jackson, South Carolina, and its activities conducted within the Fort Jackson Military Reservation, South Carolina.

This action is instituted pursuant to the provisions of Section 274d of the Judicial Code, as amended. Injunctive relief from the collection of the taxes assailed is prayed for. The amendment of August 21, 1937, to Section 24, First, of the Judicial Code, c. 726, 50 Stat. 738, which reads

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. (U. S. C. Supp. V, Title 28, Sec. 41.)"

is not applicable to this case since it is alleged in the Amended Bill of Complaint and admitted by the defendants'

Answer to the Amended Bill of Complaint that the complainants have no plain, speedy, and efficient remedy at law or in equity in the courts of South Carolina.

The Jurisdiction of the District Court thus appearing, the sole question remaining is whether this Court, sitting as a three-Judge Court, has jurisdiction to consider and decide and to grant the injunctive relief prayed for. We do not [fol. 88] think that it has. This is not a case for a three judge court under section 266 of the Judicial Code, but one to be decided by the District Judge of the District who sits as a member of the three judge court. The attack is made, not upon the constitutionality of the state taxing act nor upon orders of the state tax commission, but upon efforts of the commission to enforce the taxing act against an instrumentality of the federal government in violation of the immunity from state taxation which such instrumentality enjoys under the Constitution of the United States. This, however, is no more than unlawful action on the part of administrative officers, and the constitutionality neither of the state statute nor of an administrative order made under authority of a state statute is involved. Phillips v. United States —— U. S. ——, 61 S. Ct. 480; Ex Parte Bronsford 310 N. C. 354; Ex Parte Hobbs 280 U. S. 168. In reality nothing is involved in this case except the determination of the status of the post exchanges within the meaning of the federal statute; for everyone concedes that the state taxing statute cannot be applied so as to tax a federal instrumentality without the consent of Congress and that the federal statute does not give consent to the taxing of federal instrumentalities.

We are of opinion, for the reasons above stated, that the District Judge of the District has exclusive jurisdiction to pass upon the case; but in as much as the other judges sitting with him are in entire accord as to the findings and decree to be entered, same will be signed by all three judges, so that in the event that it should hereafter be determined that the case was one for three judges under the statute, an appropriate decree will have been entered. In the view that we take of the case, however, it is the action of the District Judge of the District which will give validity to [fol. 89] the decree and same should be considered, not as the decree of a three judge court, but as his decree, from

which appeal lies to the Circuit Court of Appeals and not to the Supreme Court.

Injunction Granted.

(S.) Alva M. Lumpkin, United States District Judge for the Eastern and Western Districts of South Carolina.

I concur:

(S.) John J. Parker, United States Circuit Judge, Fourth Circuit.

I concur:

(S.) Johnson J. Hayes, United States District Judge for the Middle District of North Carolina.

[fol. 90] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

UNITED STATES OF AMERICA; MAJOR GENERAL HENRY D. RUSSELL, United States Army, individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, individually and as Post Exchange Officer, Fort Jackson, South Carolina, Complainants,

v.

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as members of and constituting the South Carolina Tax Commission, Defendants

DECREE—Filed April 1, 1941

This cause coming on to be heard and being heard before the undersigned, constituting a Special District Court of three Judges convened pursuant to Section 266 of the Judicial Code, and the Court having found the facts and made its conclusions of law and filed its opinion in the case:

Now, therefore, for the reasons set forth in the opinion it is

Ordered, Adjudged and Declared, that the provisions of Act No. 574 of the General Assembly of the State of South Carolina, as amended, are not applicable to the activities of

the Post Exchange at Fort Jackson, South Carolina, and it is

Further Ordered, Adjudged and Decreed that the defendants, Walter G. Query, John P. Derham and John G. Richards and their agents and servants, be and they are hereby restrained and enjoined from enforcing against the [fol. 91] Post Exchange at Fort Jackson, South Carolina, any of the provisions of Act No. 574 of the General Assembly of the State of South Carolina and amendments thereto.

And the parties having stipulated that if the complainants should prevail with respect to said Post Exchange, the relief granted by the Court should be applicable to the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-commissioned Officers' Clubs described in the amended bill of complaint.

It is

Further Ordered, Adjudged and Declared that the provisions of Act No. 574, Acts of the General Assembly of the State of South Carolina, as amended, are not applicable to the activities of the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-Commissioned Officers' Clubs described in the amended bill of complaint, and it is

Further Ordered, Adjudged and Decreed, that the said defendants, Walter G. Query, John P. Derham and John G. Richards and their agents and servants, be and they are hereby likewise restrained and enjoined from enforcing against the other Post Exchanges in this District, the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-Commissioned Officers' Clubs described in the amended bill of complaint, any of the provisions of Act No. 574 of the General Assembly of the State of South Carolina and amendments thereto.

(S.) John J. Parker, United States Circuit Judge, Fourth Circuit. Johnson J. Hayes, United States District Judge for the Middle District of North Carolina. Alva M. Lumpkin, United States District Judge for the Eastern and Western Districts of South Carolina.

This the 31st day of March, 1941.

[fol. 92] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed April 16, 1941

To the complainants above named, Claud N. Sapp, United States District Attorney, and Berryman Green, Assistant Attorney General, Solicitors for Complainants:

You will please take notice, That the defendants in the above entitled cause, by their Solicitors the undersigned, have appealed, and do hereby appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decree dated the 31st day of March, 1941, and filed on the 1st day of April, 1941.

John M. Daniel, Attorney General for South Carolina; Claude K. Wingate, General Counsel, South Carolina Tax Commission, Solicitors for Defendants.

Dated this 5th day of April, A. D., 1941.

[fol. 93] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[Title omitted]

STIPULATION DESIGNATING RECORD ON APPEAL—Filed April 16, 1941

It is hereby stipulated and agreed between and by Counsel for Appellants and Appellees in this cause that the transcript of record on appeal to the United States Circuit Court of Appeals for the Fourth Circuit shall contain the following:

1. Complaint as Amended.
2. Answer.
3. Stipulation of Counsel as to the facts.
4. Exhibits. Army Regulations No. 210-65, 6-1, and C-3.
5. Findings of Fact and Conclusions of Law.

6. Decree and Opinion.
[fol. 94] 7. Notice of Appeal.
8. This Stipulation.
9. Clerk's Certificate.

And the Clerk of said Court is directed to make up the transcript of record as hereby agreed and stipulated and forward the same to the said Appellate Court.

John M. Daniel, Atty. Gen.; Claude K. Wingate, Attorneys for Appellants. Samuel O. Clark, Jr., Assistant Attorney General; C. N. Sapp, Attorneys for Appellees.

Columbia, S. C. April 12, 1941.

[fol. 95] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 96] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4810

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Appellants,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, South Carolina, Appellees

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia.

DOCKET ENTRIES

May 10, 1941, the transcript of record is filed and the cause docketed.

May 13, 1941, the appearance of Claud N. Sapp, U. S. Attorney, is entered for the appellees.

May 14, 1941, the appearance of Samuel O. Clark, Jr., Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, is entered for the appellees.

May 15, 1941, the appearance of John M. Daniel, Attorney General of South Carolina, and Claude K. Wingate is entered for the appellants.

May 20, 1941, brief and appendix on behalf of the appellants are filed.

May 26, 1941, the appearance of Louis M. Shimel, Assistant U. S. Attorney, is entered for the appellees.

June 7, 1941, the appearance of Berryman Green, Special Assistant to the Attorney General, is entered for the appellees.

[fol. 97] Same day, brief and appendix on behalf of the appellees are filed.

ARGUMENT OF CAUSE

June 25, 1941, (June term, 1941) cause came on to be heard before Soper, Dobie and Northcott, Circuit Judges, and was argued by counsel and submitted.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4810

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Appellants,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, South Carolina, Appellees

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia. Civil Action

(Argued June 25, 1941. Decided June 27, 1941)

Before Soper, Dobie and Northcott, Circuit Judges

[fol. 99] Claude K. Wingate (John M. Daniel, Attorney General of South Carolina, on brief) for Appellants, and

Berryman Green, Special Assistant to the Attorney General, and Louis M. Shimel, Assistant U. S. Attorney, (Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, Special Assistant to the Attorney General, and Claud N. Sapp, U. S. Attorney, on brief) for Appellees.

OPINION—Filed June 27, 1941

Per CURIAM:

The District Judge in this case decided that the sales taxes imposed by Act No. 574 of the Acts of 1928 of the General Assembly of the State of South Carolina are not applicable to the activities of the United States Army Post Exchange at Fort Jackson, Richland County, South Carolina. The Act of Congress of October 9, 1940, Public No. 819, 76 Congress, 3d Session, provided that no person shall be relieved from liability for any sales or use tax levied by any State on the ground that the sale or use occurred in whole or in part within a federal area; but the United States and any instrumentality thereof are expressly excepted from the provisions of the Act. The District Judge held that the post exchange at Fort Jackson is such an instrumentality. The action was brought by the United States and certain officers of the United States Army against the members of the South Carolina Tax Commission, and was heard by a three judge court organized for the purpose. The conclusion was subsequently reached, as appears from the opinion of Judge Lumpkin, 37 F. Supp. 972, that the three judge court was without jurisdiction because no attack was made upon the constitutionality of the State statute or the orders of the State taxing authorities, and that nothing was involved in the case but the determination of the question whether the post exchange is an instrumentality of the United States. [fol. 100] It was therefore held that the District Judge had exclusive jurisdiction to pass upon the case and the judgment for the plaintiffs was issued as his act. The judges who sat with Judge Lumpkin concurred in his opinion. We are in accord with the conclusions reached upon the question of jurisdiction, and upon the merits of the controversy, and the judgment is therefore affirmed upon the opinion of the District Judge.

Affirmed.

[fol. 101] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4810

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Appellants,

vs.

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, South Carolina, Appellees

DECREE—Filed and Entered June 27, 1941

Appeal from the District Court of the United States for the Eastern District of South Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed.

June 27, 1941.

Morris A. Soper, U. S. Circuit Judge.

[fol. 102] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

STIPULATION AS TO RECORD FOR USE ON PETITION FOR WRIT OF CERTIORARI—Filed July 18, 1941

It is Hereby Stipulated and Agreed by and between Counsel for the respective parties that the printed record

to be filed with the petition for certiorari in the Supreme Court shall consist of:

1. Appendix to Appellees' brief.
2. Appendix to Appellants' brief.
3. The proceedings in the Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated that the appellants in this case shall cause the Clerk of the Circuit Court of Appeals for the Fourth Circuit to transmit to the Clerk of the United States Supreme Court the original transcript of record now on file in his office, and if the petition for writ of certiorari is granted, a record shall be printed under the direction of the Clerk of the Supreme Court and shall consist of the proceedings in the Circuit Court of Appeals and of such portions of the entire transcript of record certified to the Supreme Court as the respective parties may designate.

John M. Daniel, Attorney General for South Carolina. Claude K. Wingate, Attorney for Appellants. Charles Fahy, Acting Solicitor General Attorney for Appellees.

[fol. 103] July 25, 1941, petition of appellants for a stay of the mandate pending application for a writ of certiorari is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed July 29, 1941

Upon the Application of the Appellants, by their counsel, John M. Daniel and Claude K. Wingate, and for good cause shown,

It is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date, July 26, 1941.

John J. Parker, Senior Circuit Judge.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPTS OF RECORDS IN MAKING UP RECORDS FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATIONS FOR WRITS OF CERTIORARI

For Reasons Appearing to the Court,

It is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

John J. Parker, Senior Circuit Judge.

[fol. 105] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—April 14, 1942

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The order of this Court dated November 17, 1941, denying certiorari in this case is vacated. The petition for writ of certiorari herein is granted, and the case is assigned for argument on Monday, May 4th, next, immediately following No. 1125, Standard Oil Co. of California vs. Johnson, as Treasurer of the State of California.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed April 18, 1942

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted April 14, 1942, the printed record may consist of the following:

1. The entire record filed in this Court except Army Regulations, No. 210-65, 1, and No. 210-65, *C3, both of which may be omitted but will be supplied separately to the Court.
2. This stipulation.

Charles Fahy, Solicitor General of the United States.
Claude K. Wingate, Counsel for Petitioner.

Dated this 18th day of April, 1942.

Endorsed on Cover: File No. 45,947 U. S. Circuit Court of Appeals, Fourth Circuit, Term No. 619. Walter G. Query, John P. Derham and John G. Richards, as Members of and Constituting the South Carolina Tax Commission, Petitioners, vs. The United States of America, Major General Henry D. Russell, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, et al. Petition for a writ of certiorari and exhibit thereto. Filed September 16, 1941. Term No. 619 O. T. 1941.

Supreme Court of the United States

OCTOBER TERM, 1941

No. ------

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT, WITH SUPPORTING BRIEF

JOHN M. DANIEL,
Attorney General,
CLAUDE K. WINGATE,
Attorneys for Petitioners.

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INDEX

	Page
Petition for Writ of Certiorari:	
Petition	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	5
Brief in Support:	
I. Opinions of Courts Below	7
II. Jurisdiction	8
III. Statement	8
IV. Specification of Error	8
V. Argument	8
Conclusion	10

TABLE OF CASES CITED

PAGE

Pan American Petroleum Corporation v. State of Alabama, 67 Fed. (2d), 590 5

Panhandle Oil Company v. State of Mississippi, 277 U. S., 218, 48 S. Ct., 45, 72 L. Ed., 857, 56 A. L. R., 583 10

United States v. Query et al., 37 Fed. Supp., 975 9

Walter G. Query et al. v. U. S. of America et al., 121 Fed. (2d), 631 9

Supreme Court of the United States

OCTOBER TERM, 1941

No. ------

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT, WITH SUPPORTING BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals in the above-entitled cause for the Fourth Circuit, entered in the above-entitled cause, on the 27th day of June, 1941 (121

Fed. (2d), 631), affirming judgment of the District Court of the United States for the Eastern District of South Carolina (37 Supp., p. 972), granting a permanent injunction restraining the petitioners from enforcing, or attempting to enforce, the provisions of Act No. 574, as Amended, with respect to sales of taxable commodities by Post Exchanges in South Carolina.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals reported in 121 Fed. (2d), 631. The opinion of the District Court for the Eastern District of South Carolina is reported in 37 Fed. Supp., 972.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on the 27th day of June, 1941 (Record, page 56). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether or not post exchanges, ships' service stores and marine post exchanges, operated in South Carolina, are subject to a sales tax on commodities sold by these organizations while operating in South Carolina?

2. Whether or not army post exchanges, navy ships' service stores and marine post exchanges, as operated, are instrumentalities of the United States and not subject to sale taxes on non-essential commodities sold by them in South Carolina?

3. Whether or not under the provisions of Act of Congress, approved October 9, 1940, Public No. 819, 76th Congress, 3rd Session, removing the immunity from State

taxes on Federal reservations, army post exchanges, naval ships' service stores and marine post exchanges must pay the South Carolina sales taxes on taxable commodities sold and distributed by them?

STATUTES INVOLVED

The taxing statute, Act No. 574, Acts of 1928, as amended, incorporated in Code of Laws of South Carolina, 1932, as Sections 2527-2557, inclusive, the pertinent parts of which are contained in the record, page 43.

Act No. 861, Acts of the General Assembly of South Carolina, approved the 30th day of April, 1938 (Record, page 46).

Public Act 819, 76th Congress, 3rd Session (Record, page 47).

STATEMENT

Respondents' action is to secure a permanent injunction against petitioners enforcing the provisions of Act No. 574, Acts of the General Assembly of 1928, as amended, incorporated in the Code of 1932, as Sections 2527-2557, inclusive, levying a sales tax on certain commodities sold or distributed in South Carolina when such sales or distributions are made by army post exchanges, naval ships' service stores and marine post exchanges.

There is also involved in this action, Act No. 861, Acts of the General Assembly of South Carolina, 1938, levying a use tax on certain commodities used in South Carolina, the question being whether or not these organizations of army and navy personnel are required to collect the use tax on commodities not theretofore subject to the sales tax?

Also involved in this action is whether or not under the provisions of Act No. 819, 76th Congress, 3rd Session, army post exchanges, naval ships' service stores and ma-

rine post exchanges are instrumentalities of the United States?

Act No. 819, 76th Congress, 3rd Session, removed the immunity from State sales or use taxes on the sale or use of personal property on Federal reservations, but provided that these sales or use taxes could not be levied against the United States or any of its instrumentalities.

This action was commenced in the District Court for the Eastern District of South Carolina, a three-judge Court being called, pursuant to and under the provisions of Section 266 of the Judicial Code.

After hearing arguments, the three-judge Court held that this was not a proper case for a three-judge Court, therefore, a decision was rendered by the District Judge and provided that any appeal therefrom must be taken to the Circuit Court of Appeals and not directly to this Court. However, the other two Judges sitting with the District Judge, concurred in the opinion of the District Judge (37 Fed. Supp., 972).

The District Court held that army post exchanges, ships' service stores and marine post exchanges were instrumentalities of the United States, not by reason of any Congressional authorization or requirement, but by reason of army regulations permitting superior officers to establish these organizations wherever needed. This decision of the District Court was affirmed by the Circuit Court of Appeals in an opinion not yet reported.

Respondents are engaged in the business of operating general merchandise stores in South Carolina, some of these stores being operated on and some off Federal reservations. These general merchandise stores are owned exclusively by the personnel of the army, navy and marine; they sell certain commodities, such as cigarettes, tobacco products, soft drinks, beer and wine, which are subject to a sales tax un-

der the South Carolina Statutes. These commodities are also subject to a use tax, if when used they have not theretofore borne the sales tax. None of these commodities sold in these stores are necessary for the personnel to have in order that they may properly carry out their official duties and functions to the Federal Government.

The only exemption contained in the Act of Congress removing the immunity from these taxes on Federal reservations is on sales by the United States or its instrumentalities. The Tax Commission, as an administrative body, concluded that post exchanges, and similar organizations, being owned exclusively by the personnel and operated solely for their benefit, were not instrumentalities of the United States and exempted from the sales tax, or from the requirement of collecting the use tax, in case the sales tax was not paid (This conclusion by the Tax Commission has been disapproved by the District Court and the Circuit Court of Appeals).

REASONS FOR GRANTING THE WRIT

1. The question involved in this litigation is of utmost importance to many states. There are more than twenty (20) states which impose a sales tax on certain non-essential commodities, or a general sales tax on all retail sales made within such states. There are many suits now pending in the various states to determine whether or not these sales are taxable.

2. The decision in the instant case for which a petition for a writ of *certiorari* is prayed is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Pan American Petroleum Corporation v. State of Alabama*, 67 Federal (2d), 590. *Certiorari* was denied in that case on February 12, 1934, 291 U. S., 670, 54 Supreme Court Reporter, 454. In the instant case

the Court has held that army post exchanges, naval ships' service stores and marine post exchanges are instrumentalities of the United States, and not subject to a sales tax. The Circuit Court of Appeals for the Fifth Circuit, in the *Alabama case*, has held post exchanges not to be instrumentalities of the United States and subject to taxation by the State of Alabama.

3. The Circuit Court of Appeals having decided an important question of Federal law in this case, which has not been, but should be settled by this Court. The Circuit Court of Appeals for the Fourth Circuit has decided that question in direct conflict with a former decision of the Circuit Court of Appeals for the Fifth Circuit.

4. Act No. 819, 76th Congress, 3rd Session, removed the immunity from State sales tax on Federal reservations. This Act of Congress, not having heretofore been construed by this Court, should be definitely settled as to the proper construction thereof in order that the many states involved may properly administer the states' laws.

WHEREFORE, upon this petition, upon the annexed brief, and upon a certified transcript of the record of the proceedings in the District Court for the Eastern District of South Carolina, and in the Circuit Court of Appeals for the Fourth Circuit, petitioners pray that a writ of *certiorari* be issued to them and that said cause may be reviewed and determined by this Court as provided by law, and that upon such review the said judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed.

JOHN M. DANIEL,
Attorney General.
CLAUDE K. WINGATE,
Attorneys for Petitioners.

September, 1941.

Supreme Court of the United States

OCTOBER TERM, 1941

No. ------

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINIONS OF COURTS BELOW

The opinion of the District Court is reported in 37 Fed. Sup., 972; the opinion of the Circuit Court of Appeals in 121 Fed. (2d), 631 (decided June 27, 1941).

II

JURISDICTION

The date of judgment sought to be reviewed is June 27, 1941.

The jurisdiction of this Court is invoked under the provisions of the Judicial Code, Sec. 240(a), as amended by Act of February 13, 1925.

III

STATEMENT

The statement contained in the petition sufficiently sets forth the controlling facts.

IV

SPECIFICATION OF ERROR

The ruling of the District Court and affirmed by the Circuit Court of Appeals, as set out in the petition, which held army post exchanges, naval ships' service stores and marine post exchanges instrumentalities of the United States and not subject to State sales tax, is assigned as error.

V

ARGUMENT

The Act of Congress, approved October 9, 1940, Public Act No. 819, 76th Congress, 3rd Session, removed immunities of State taxes on Federal reservations. That Act provided, however, that no sales taxes should be collected by the State from the United States or any of its instrumentalities.

Under the provisions of Act No. 574, Acts of the General Assembly of South Carolina, 1928, as amended, a sales

tax is levied on the sale or distribution of certain non-essential commodities. The only question, as we see it in this case, is whether or not army post exchanges, naval ships' service stores, marine post exchanges, officers clubs and non-commissioned officers clubs, are instrumentalities of the United States and exempt from the South Carolina sales tax.

There is no Act of Congress permitting or directing the operation of any of these organizations, and they are operated solely under regulations of the war department and permission from superiors. The United States has no pecuniary interest therein, nor does it share in any of the profits.

The District Court held:

> "We are of opinion that the provisions of the state statute are not applicable to the activities of the Post Exchanges, that the Federal Act does not give to the defendants the power to enforce such provisions against such activities, and that the order of the defendants to enforce the provisions of the state statute against such activities and their threat to enforce and their attempts to enforce the same constitute an interference with the activities of the United States, and are unconstitutional."

United States v. Query et al., 37 Fed. Supp., 975.

The Circuit Court of Appeals for the Fourth Circuit, on appeal from the decision of the District Court, held:

> "We are in accord with the conclusions reached upon the question of jurisdiction, and upon the merits of the controversy, and the judgment is therefore affirmed upon the opinion of the District Judge."

Walter G. Query et al., v. U. S. of America et al., 121 Fed. (2d), 631, decided June 27, 1941.

We find a conflict in the decision of the Circuit Court of Appeals for the Fifth Circuit, in which it was held:

> "(3, 4), It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to

the United States, either directly or indirectly through one of its departments, for government use. *Panhandle Oil Company v. State of Mississippi*, 277 U. S., 218, 48 S. Ct., 451, 72 L. Ed., 857, 56 A. L. R., 583. There a sale of gasoline was made direct to the United States for the use of the coast guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore, a post exchange is, of course, not the government, nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to post exchanges at Camp McClellan and Maxwell Field are not exempt from the state excise taxes."

Pan American Petroleum Corporation v. State of Ala., 67 Fed. (2d), 590;

Certiorari denied February 12, 1934, 291 U. S., 670, 54 Sup. Ct. Rep., 454.

CONCLUSION

It is apparent that this is a question of utmost importance to the various states levying sales or use taxes, and it is submitted that the decision of the Circuit Court of Appeals for the Fourth Circuit holding these organizations to be instrumentalities of the United States and not subject to States sales or use tax is erroneous.

It is also submitted that there is clearly a conflict in the decision in this case with that of the *Alabama case* from the Fifth Circuit Court of Appeals.

For the reasons assigned in the petition and in this brief, the writ of *certiorari* should be granted and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General,
CLAUDE K. WINGATE,
Attorneys for Petitioners.

September, 1941.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

PETITIONERS' ARGUMENT

Supreme Court of the United States

OCTOBER TERM, 1941

No. 619

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA, RESPONDENTS.

PETITIONERS' ARGUMENT

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INDEX

	Page
Opinions Below	1
Statement	3
Argument	5

TABLE OF CASES CITED

	Page
Curry v. United States et al., 62 Sup. Ct. Rep., 49	20
Keane v. United States, 272 Fed., 577, 580	10
Pan American Petroleum Corp. v. State of Ala., 67 Fed. (2d), 590	16, 17
Panhandle Oil Co. v. State Miss., 227 U. S., 218, 48 Sup. Ct. Rep., 451, 72 Law Ed., 857, 56 A. L. R., 583	18
Standard Oil Co. v. Cal., 291 U. S., 242, 54 Sup. Ct. Rep., 381	18
State of Alabama v. King & Boozer et al., 62 Sup. Ct. Rep., 43	19, 20

STATUTES INVOLVED

Judicial Code U. S., Section 240 (a), as Amended	2
S. C. Code, Sections 2527-2557	3
Acts of S. C., No. 861, 1938	7
Acts of S. C., No. 574, 1928	7
Act 76th Congress, No. 819	3

MISCELLANEOUS

Army Regulations, No. 210-65, Paragraph 48	11
Army Regulations, No. 210-65, Sub-sec. e of Sec. 80, pages 44-45	16
Senate Report, Cal. No. 1692, Report No. 1625, 76th Congress 3rd Session	6
Excerpt from Collier's Magazine, June 27, 1941, page 23	15

PETITIONERS' ARGUMENT

Supreme Court of the United States

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WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

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UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA, RESPONDENTS.

This case is before this Court by reason of petition for writ of *certiorari* having been granted on April 14, 1942. It is an appeal from the Circuit Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of South Carolina is reported in 37 Federal Supple-

ment, 972. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 121 Federal (2d), 631.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

Respondents' action is to secure a permanent injunction against petitioners enforcing the provisions of Act No. 574, Acts of the General Assembly of 1928, as amended, incorporated in the Code of 1932 as Sections 2527-2557, inclusive, levying a sales tax on certain commodities sold, or distributed, in South Carolina when such sales or distributions are made by army post exchanges, navy ships' service stores and marine post exchanges.

There is also involved in this action, Act No. 861, Acts of the General Assembly of South Carolina, 1938, levying a use tax on certain commodities used in South Carolina when such commodities have not theretofore been subject to the sales tax or upon which the sales tax has not theretofore been paid.

Also involved in this action is whether or not under the provisions of Act No. 819, 76th Congress, 3rd Session, army post exchanges, naval ships' service stores and marine post exchanges are instrumentalities of the United States.

The District Court held that army post exchanges, ships' service stores and marine post exchanges were instrumentalities of the United States, not by reason of any Congressional authorization or requirement, but by reason of Army Regulations permitting superior officers to establish these organizations wherever needed. This decision of the District Court was affirmed by the Circuit Court of Appeals for the Fourth Circuit.

Respondents, other than the United States, are engaged in the business of operating general merchandise stores in South Carolina, some of these stores being operated on and some off Federal reservations. These general merchandise stores are owned exclusively by the personnel of the army, navy and marine; they sell, among

other things, certain commodities, such as cigarettes, tobacco products, soft drinks, beer and wine, which are subject to a sales tax under the South Carolina law. These commodities are also subject to a use tax, if when used they have not theretofore borne the sales tax. None of these taxable commodities are necessary for the personnel to have in order that they may properly carry out their official duties and functions to the Federal government.

The only exemption contained in the Act of Congress removing the immunity from these taxes on Federal reservations is on sales by the United States, or its instrumentalities. The only exemption contained in the South Carolina law is on taxable commodities when sold to the United States.

The assigned error intended to be urged is the holding of both the District Court and the Circuit Court of Appeals that army post exchanges, navy ships' service stores and marine post exchanges are instrumentalities of the United States and not subject to the South Carolina sales tax.

ARGUMENT

The District Court for the Eastern District of South Carolina and the Circuit Court of Appeals for the Fourth Circuit held that post exchanges, ships' service stores, marine post exchanges, officers' clubs and non-commissioned officers' clubs are instrumentalities of the United States.

In view of this holding, we feel that the only question involved in this case is whether or not these organizations, when operated on or off Government reservations, are instrumentalities of the United States?

In the beginning of this argument we would like to give the Court a history of the development and reason for the passage of the Act of Congress hereinafter referred to.

For many years post exchanges were operated on military reservations which had been ceded to the United States and, therefore, beyond the reach of the State in which geographical bounds such organizations operated.

There was such a wide abuse of the immunity of these organizations from sales or use tax by reason of their operation on Federal reservations that some seven or eight years ago representatives from more than twenty states appeared before the Congress and appealed to it to enact legislation which would not only cure these abuses, but would also permit the states to collect their sales or use tax on taxable commodities sold by these organizations of the army and navy personnel.

The result of the appeals made to Congress by the various states was the enactment in 1936 of a Federal Statute requiring post exchanges, and similar organizations, operating on Federal reservations, to make returns and pay to the state in which they were located gasoline taxes on all gasoline not sold to the United States. Since the approval of that Act post exchanges and similar organizations

in South Carolina, in compliance with the statute, have been making returns and paying the gasoline tax to the South Carolina Tax Commission on all gasoline sold by them to persons other than the United States.

During the year 1939 a Bill was introduced and passed by the national House of Representatives removing the immunity theretofore enjoyed by persons or organizations selling or using taxable commodities within a Federal area, only exempting the United States and its instrumentalities. This Bill then went to the Senate of the United States where it was slightly amended and passed by that legislative body over the protest of the army and navy departments and with the sanction and approval of tax representatives from at least twenty-six states of the Union.

It is our information that other protests and appeals were made by these departments to the President to veto this statute, but instead it was signed by the President on October 9, 1940, and became operative on January 1, 1941.

It is interesting to observe that this Bill was introduced in the House of Representatives by Representative Buck, of California, in whose district is situated Mare Island Navy Yard, and it is our information that it was on account of the abuses there and the large loss of revenue to the state of California by the operation of these general stores, owned exclusively by the personnel of the navy, that prompted Representative Buck to introduce and foster this legislation.

The Congress refrained from defining a post exchange or other similar organization. Of course ships' stores or commissaries operated by the United States are not here in controversy. In its report the committee of the Senate, Calendar No. 1692, Report No. 1625 of the Senate, 76th Congress 3rd Session, had the following to say with reference to post exchanges, and similar organizations:

"For example, tangible personal property purchased from a commissary or ship's store by an Army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store, is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the State income taxes by virtue of section 2 of the committee amendment."

Under the various revenue laws of South Carolina, Act No. 574, of the Acts of 1928, as amended, the pertinent portions of which are printed in the Record, page ..., tobacco products, beer, wine, soft drinks, alcoholic liquors, and playing cards are subject to a sales tax when the sale thereof takes place within South Carolina, the only exemption contained in these State Statutes being when such commodities are sold directly to the United States. In addition to the sales tax, Act No. 861, of the Acts of 1938, there is a use tax on tobacco products, playing cards, cartridges and shells used or consumed in this State, when such commodities have not theretofore borne the sales tax, Record, page ....

It will be borne in mind that the Act of Congress, above referred to, removes the immunity from State sales or use tax on sales or use of commodities on Federal reservations,

and exempts no person, firm or corporation except the United States or its instrumentailities.

In view of the language of the Act of Congress, it is our view that the only material question to be determined in this case is whether or not post exchanges, officers' clubs, non-commissioned officers' clubs, and similar organizations, of the army and navy personnel, regardless of where such organizations may be situated, are instrumentalities of the United States.

It is our contention that these organizations being purely voluntary, owned by the personnel, operated for their pleasure and convenience, and all profits being used directly or indirectly for the benefit of such personnel, and no requirement for their operation, they are not instrumentalities of the United States Government and exempt from State taxation.

As we understand the law, an organization which could be legally termed an instrumentality of the United States must find its origin and right to exist under some Act of the Congress. We have found no such Act permitting or requiring the establishment or operation of such organizations as are here under consideration. They are operated solely and exclusively by permission of the commanding officers of the area involved.

The mere fact that they are operated in some instances in Government owned buildings would not create them an instrumentality of the United States. In fact, under the Army Regulations (copies of which are in the hands of the Court) oftentimes the exchanges and similar organizations construct their own buildings from their own funds and when so constructed the buildings become the property of the exchange.

These organizations of the army and navy personnel, operated for their own pleasure, convenience and profit, are

in no sense of the word instrumentalities of the United States, but as inferior Courts have said many times, are voluntary unincorporated cooperative associations, more or less partnerships among the personnel of the army and navy and operated under permission granted by the commanding officers, by, for, and on behalf of the personnel of the army and navy departments.

"In this connection, the counsel for the Government, in his brief and argument, insists that post exchanges are governmental institutions, associations, and agencies, and says:

" 'It cannot be denied that such agents are established under regulations promulgated and established by the War Department.'

"He refers us to Section 161 of the revised Statutes (Comp. St. Section 235) for the authority of the Secretary of War to make such regulations with reference to these exchanges. The Section reads as follows:

" 'The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.'

"This section only gives the heads of departments, including the Secretary of War, power to issue rules and regulations for the administration of their departments. Indeed, the power conferred by this section is administrative only (*U. S. v. George*, 228 U. S., 14, 33 Sup. Ct., 412, 57 L. Ed., 712), which means that the Secretary of War, if he had power to issue the regulation at all, only had power to compel or permit the soldiers to establish these post exchanges in question, but could not, in the absence of the express authority of Congress, make persons not connected with his department bound by such regulations, or subject to the pains and penalties of criminal law. If a head of a department

has the power to make rules which subject classes of property to forfeiture and classes of persons to penalties, that power must be expressly given him by Congress, and well defined, so as to make his rule or regulation an act of the supreme law-making body. He will get no such power from Section 161 of the Revised Statutes, *U. S. v. 11,150 pounds of Butter,* 195 Fed., 657, 115 C. C. A., 463."

Keane v. United States, 272 Fed., 577, 580.

There are many activities, including the operation of barber shops, on the reservations in South Carolina in buildings owned by the United States, and it is our information that a portion of the receipts from these concessions must go to the organizations which they serve, and yet it would be absurd to say that a barber shop operated by an individual under permission of the commanding officer of the area involved becomes an instrumentality of the United States and not subject to State taxation merely because it was being operated in a government building and a portion of the receipts under the concession granted should go to the organization served.

Under the regulations by which these organizations are established, there being no Act of Congress permitting or directing the establishment thereof, the United States furnishes no funds with which to buy the stock of merchandise, to begin the operation of the organization, nor does the United States furnish any funds with which to replenish such stock. The United States does not extend any credit, nor is it liable for any debts made by post exchanges, and in no manner share in the profit derived from the operation thereof. According to the regulations under which permission is granted to organize these general cooperative stores, even the fixtures therein are purchased with funds of the organization, or furnished by the merchants making sales to such organizations. The title to the stock of merchandise,

fixtures and all buildings which are erected with post exchange funds, is never in the United States; but, on the contrary, is the sole property of the exchange purchasing or erecting the same. When the personnel of an exchange moves from a reservation it may remove any building it has theretofore erected.

We call special attention of the Court to paragraph 48 of Army Regulations No. 210-65, which is as follows:

> "48. Funds for establishing.—a. The expense of fitting up the quarters of an exchange and procuring the necessary articles for the first stock and fixtures will be met by assessment from the funds of the several organizations which make up the membership of the exchange, or these will be contracted for, or procured on credit. When procured on credit, the bills will be paid from the first profits. The post exchange is responsible for the debt, and not the Government. This will be made perfectly clear to those extending credit.
>
> "b. The funds for the establishment of exchanges in the field will be drawn from the funds of participating organizations. Such funds will normally originate in large part from the liquidation of interests in exchanges at the home station of such organizations. A reasonable portion of the funds of organizations will, therefore, be held available for the establishment of field exchanges. The sum thus held will normally be not less than one dollar ($1) for each man of the authorized strength of the organization."

It is clear from this regulation under which post exchanges, and other similar organizations begin operations, that all expenses incurred in connection therewith are either secured by credit extended to the exchange, or by assessment of the personnel of the organizations which make up the membership of the exchange.

If there is any profit made from the activities carried on or sales made by exchanges, and similar organizations,

such profit does not inure to the benefit of the United States, but to the personnel composing the membership of such organizations. If in turn liabilities are incurred, they are against the membership of the exchanges and not against the United States. Paragraph 72 of Army Regulations No. 210-65, specially provides that funds of a post exchange are not public funds, therefore, such funds belong to the exchange, which is a partnership, and in turn actually belong to the personnel making up the membership of the exchange.

None of the commodities subject to the sales or use tax of South Carolina are necessary for the personnel to have in order that it may carry out its functions and obligations to the United States, but are only luxuries sold by these stores for the pleasure and convenience of the personnel.

As for officers' clubs, we find no army regulations pertaining to such clubs. No such regulations have been mentioned by respondents or by the Court. It seems that officers' clubs are organized without regulations. A crowd of congenial officers get together and organize an officers' club for the purpose of securing their meals, which they pay for themselves, at a nominal cost, and for the sale and distribution of luxuries which they may desire. These luxuries include alcoholic liquors which, under Federal law, it is unlawful to sell or distribute on military reservations. These officers' clubs are not necessarily located on government reservations. In fact there is one located in the City of Columbia on Hampton Street only a few blocks from Main Street.

We can see no sound difference between the army personnel operating an exchange, or an officers' club, for its convenience, than the employees of the post office or Internal Revenue Departments in Columbia operating an ex-

change for their pleasure and convenience for both would be operating a general merchandise store owned by themselves and entirely for their pleasure and convenience.

As a matter of fact, petitioners have been requested from time to time to permit the operation of such stores by the personnel of the Internal Revenue Departments and the United States Post Office and permit them to sell taxable commodities free of either the sales or use tax of South Carolina.

If we should view the State as a whole, we would find that there are many United States employees or personnel of the United States Government who could organize themselves into a partnership, the same as exchanges are organized, and defeat the State from collecting its lawful revenue by selling taxable commodities and calling themselves or their organizations instrumentalities of the United States. There is no Act of Congress authorizing such organizations by the personnel of the Postal Department, the Internal Revenue Department, the Army, or the Navy Department.

We can see no sound difference in the army and navy personnel organizing partnerships among themselves under regulations of superiors for the purpose of operating a general merchandise store, than that of any other unit of Federal employees doing likewise and calling their organizations instrumentalities of the United States. The mere fact that the organizations thought themselves instrumentalities of the United States Government does not mean that they are such, as a matter of law.

There is no sales or use tax in South Carolina on the sale or use of any commodity which is necessary, but only upon those luxuries which are often desired by people.

If any of the commodities sold by or distributed by exchanges and taxable under the South Carolina law were

necessary for the personnel to have in order that it might properly carry out its official functions and duties to the army and navy, the United States would furnish such items. It may not be amiss to say at this juncture that the Federal tax on such commodities as are taxable under the revenue laws of the United States, and which are distributed and sold by exchanges are collected by the Federal Government, whether it be a sales or manufacturer's tax.

Paragraph 77 of Army Regulations, No. 210-65, provides that exchanges are, in a sense, associations of military personnel for business purposes and that as such are subject to the stamp tax imposed by the Internal Revenue Statute and such exchanges are not permitted to sell or distribute such commodities upon which special stamps are required until such stamps have been affixed. The only possible conclusion which can be drawn from such regulation is that post exchanges composed of the personnel of the units participating therein are business organizations for the purpose of doing a general merchandise business.

We repeat that a post exchange is a voluntary unincorporated cooperative store, at, near, or on a government reservation, the commanding officer thereof giving such privilege or permission to form such cooperative store. The purpose of such cooperative store is to supply, by sale, the personnel at reasonable prices such articles desired by them which are luxuries, not necessary and not furnished by the government, the profits which are used for the sole pleasure and convenience of the personnel.

It is absurd to say because a number of officers attached to units at Fort Jackson, but living in the City of Columbia, organize an officers' club, located within the City of Columbia, and there have their gatherings, social or otherwise, sell and distribute alcoholic liquors, beer, wine, tobacco products, or other commodities subject to

the South Carolina Sales or Use Tax, and because they are officers of the United States Army, the State could not collect its tax on these items.

The size attained by post exchanges is briefly shown in the following excerpt from Collier's Magazine for June 27, 1941, at page 23:

> "Post Exchange Officer Maj. H. E. McGaffey, called from retirement after twenty-four years in the Army and ordered to set up Blanding's canteens, launched the business last November 9th in a one-room building with an operating force consisting of himself, four noncoms, one private, one light truck and of capital not a red cent except $60 of his own which he converted into change. Today the P-X employs 440 civilians and 198 soldiers, has an $18,500 pay roll every fifteen days, sells around $350,000 worth of merchandise every month and turns over its entire stock every twenty days. It's an enterprise for which almost any business man would sell his soul. The P-X operates the Central Exchange, which serves as headquarters; thirty-five canteens (one for each regiment); three warehouses, eight trucks, thre bus terminals, seven taxis, eight public filling stations, a garage, a restaurant, four cafeterias and a privately operated shoe repair shop."

The above quotation is used for the purpose of argument and it clearly shows the enormous size a post exchange, or other similar organization, can attain, none of the profits of which ever inure to the benefit of the United States.

In connection with the article above referred to, we should call attention to another paragraph of the Regulations. The Regulations provide the same definition of post exchanges that we are here contending for, and the same as has been applied by the Courts many times.

These Regulations, in effect, say to the organizations desiring to operate post exchanges, or similar organization, you may do so, but they must be operated under certain rules and restrictions. As we see it, among the purposes of the restrictions are: That only a sufficient number be operated to be profitable. No one be allowed to graft or steal from the exchange. That exorbitant prices be not charged for the commodities sold. That civilian employees be not paid exorbitant salaries at the expense of the members. And that the business be run on a paying basis.

> "e • • • A post exchange is a voluntary unincorporated cooperative association of Army organizations, a kind of cooperative store, in which all share in the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a post exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of an inability on the part of a post exchange to pay its debts, the organizations which participate in the post exchange should themselves pay off all such obligations in proportion to their respective interest in the exchange."
>
> Army Regulations No. 210-65, Sub-section e, of Section 80, pages 44-45.

The Act of Congress, above referred to, we might say, ceded back to the States the power and authority to levy and collect sales or use, or income taxes on Government reservations. Since this has been done by the Congress, it makes no difference if these clubs, exchanges and other similar organizations, are located on or off reservations, they are subject to the South Carolina sales or use tax.

The decision of the District Court and the Circuit Court of Appeals in the instant case is in direct conflict with the decision in the case of *Pan American Petroleum*

Corporation v. State of Alabama. Certiorari was denied by this Court in that case.

It seems to us that if there had been any serious doubt in the minds of the Supreme Court that post exchanges were not instrumentalities of the United States, *certiorari* would have been granted in order that this most important question be finally settled. Under the decision in that case Alabama was permitted to collect taxes on taxable commodities sold to post exchanges at Camp McClellan.

"(3, 4). It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly or indirectly through one of its departments, for government use. *Panhandle Oil Company v. State of Mississippi*, 277 U. S., 218, 48 S. Ct., 451, 72 L. Ed., 857, 56 A. L. R., 583. There a sale of gasoline was made direct to the United States for the use of the Coast Guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore, a post exchange is, of course, not the government, nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges at Camp McClellan and Maxwell Field are not exempt from the state excise taxes."

Pan American Petroleum Corporation v. State of Ala., 67 Fed. (2d), 590;

Certiorari denied February 12, 1934, 291 U. S., 670, 54 Sup. Ct. Rep., 454.

Until the decision of the Circuit Court of Appeals in the instant case, the above decision was the latest expression of a Circuit Court of Appeals on the question here involved. The Court said, and we think correctly so, that post exchanges, or similar organizations, were purely private organizations for the pleasure and convenience of the personnel making up the organizations, and we submit if they are, the territorial immunity having been removed by the Act of Congress, South Carolina sales and use taxes apply to the sale or use of taxable commodities at such exchanges.

In the case of *Panhandle Oil Company v. The State of Mississippi.* the Court was divided five to four in refusing to allow the State of Mississippi to collect a sales tax on gasoline sold to the Veterans Administration for the use of a government hospital and to the Coast Guard for its use. Justice Holmes wrote a very strong dissenting opinion concurred in by three other justices. In that case there was no question as to instrumentalities of the Federal Government, inasmuch as both purchasers involved were not only instrumentalities of the United States, but were actually departments of the United States, or, we might say, the United States itself.

Panhandle Oil Co. v. Miss., 227 U. S., 218, 48 Sup. Ct. Rep., 451, 72 L. Ed., 857, 56 A. L. P., 583.

In the case of *Standard Oil Company v. California,* the Supreme Court of California held that post exchanges located on the Presidio were subject to gasoline taxes levied under the California law. The Supreme Court reversed this decision not upon the ground that post exchanges were instrumentalities of the United States, but upon the ground that California had no jurisdiction over the Presidio which had been ceded to the United States.

Standard Oil Co. v. Cal., 291 U. S., 242, 54 Sup. Ct. Rep., 381.

We feel sure that the decision in that case would have been entirely different had Congress permitted California to levy a sales or use tax within the reservation as it has now done by the Act of Congress here in question.

The District Judge in his opinion laid great stress upon the case of *New York, Ex Rel, Rogers v. Graves,* 299 U. S., 401, 57 Sup. Ct. Rep., 269, stating that the Supreme Court held the Panama Railroad Company to be an instrumentality of the United States by reason of an executive order of the President, dated February 6, 1934.

That decision has since been overruled by this Court and is, therefore, no longer the law. As we understand it, the reason for the overruling of that decision was that a tax against an employee of the Panama Railroad Company, or any other employee of the United States, or any of its instrumentalities, could not in any wise interfere with the United States.

Any tax which might be imposed by South Carolina upon the sale or use of taxable commodities by post exchanges, or similar organizations within South Carolina, could not in anywise directly or indirectly affect or burden the United States, because such tax would necessarily be paid by the purchasers, or from funds of the post exchange which funds belong to the personnel operating the same.

We think that the recent case of *State of Alabama v. King & Boozer et al.,* 62 Supreme Court Reporter, 43, in which it was held that the sales tax levied under the Alabama Statute was applicable to "cost plus" a fixed fee contract with the United States, certainly would be applicable here. In that case the Court said:

> "But however extensively the government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the

contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S., 415, 421, 59 S. Ct., 267, 270, 83 L. Ed., 260; *United States v. Driscoll*, 96 U. S., 421, 24 L. Ed., 847. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract."

State of Alabama v. King & Boozer et al., 62 Sup. Ct. Rep., page 43.

See also *Curry v. United States et al.*, 62 Sup. Ct. Rep., page 49.

Clearly the Government furnishes no money with which to purchase the original stock of merchandise for these post exchanges, neither does it extend any credit. Any purchases made or credits extended are by and to the post exchange and it alone is liable therefor. At no time does the Government ever come into possession of any of the property purchased by or owned by a post exchange; and, if we may repeat, any taxation of the post exchange, or similar organization, could not in anywise impede, retard, or affect the operations of the United States.

In the last above-cited case, the Government reserved the right to restrict and control the action of the contractor, yet the contractor was held not to be an instrumentality of the United States and exempt from the Alabama sales tax even though that tax would necessarily add to the cost to

the Government in completing a camp site, or other buildings necessary for its use.

We have no such result in the instant case. Here a general cooperative store is organized by the personnel of a particular unit and is termed a post exchange, officers' club or non-commissioned officers' club. When this organization is set up, it makes its own purchases of commodities it desires to sell at retail or otherwise; it either furnishes the cash for the purchase thereof, or such is secured on the credit of the organization. When such purchases are made, the title to the goods, wares or merchandise is in the organization making the purchase. At no time does the United States have title thereto. After the goods are received, sold, and the cash received therefor, the United States has no title to the cash, but the same belongs to, and is the property of the organization making the sales.

It is true that under the regulations, under which these organizations operate, certain army officers have control over the operation of the mercantile business, but, as was said in the last above-cited case, it makes no difference if the Government itself, rather than the officers, reserves the right to restrict or control the actions and functions of the post exchange, this would not convert it into an instrumentality of the United States and exempt from State taxation.

If this Court should not declare these organizations of army and navy personnel for their own pleasure, interest and profit, to be private, cooperative mercantile establishments, then they can be established and operated anywhere in South Carolina, even on the main street of its principal cities and be free from any taxation by the State.

The tax attempted to be levied and collected by the petitioners under valid South Carolina Statutes is a non-dis-

criminatory tax on the sale or use of certain non-essential commodities within this State. Under the terms of these Statutes every person making a purchase or using these non-essential commodities is placed in the same class, the only exemption being on sales or uses by the United States.

We have, heretofore, shown that the Federal Government has no pecuniary interest in the operations of post exchanges, or similar organizations, therefore, no burden directly or indirectly could be placed on the Federal Government by the levying and collection of this tax which automatically would be passed on to the purchaser and the consumer.

It will be borne in mind that the State of South Carolina is only attempting to levy and collect a tax in accordance with its revenue laws on the sale or use of taxable non-essential commodities sold or used by post exchanges, or similar organizations, whether or not they be operated on or off Federal reservations. In no case would there be any attempt on the part of this State to collect a tax from the United States, neither is the State attempting to regulate the sales nor collect a license fee for the privilege of doing business. The reason for the State not attempting to do this is that the Act of Congress, as we understand it, has only ceded back to the State the right to collect a sales, use, or income tax on territory formerly ceded to the United States and, therefore, immune from State taxation, except by permission of Congress.

We submit that these organizations are not in any sense of the word instrumentalities of the United States, and the right of the State to tax on ceded territory having been given back to the State under the Buck Act, the State may lawfully tax any sale or use of tangible personal prop-

erty on Federal reservations, except where the sale or use is by the United States or its *bona fide* instrumentalities.

Respectfully submitted,

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APPENDIX TO PETITIONERS' BRIEF

Supreme Court of the United States

OCTOBER TERM, 1941

No. 619

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA, RESPONDENTS.

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INDEX TO APPENDIX

	PAGE
Pertinent Portions of S. C. Act, No. 574, as Amended	2
Act No. 861 of South Carolina	5
Act No. 819, 76th Congress U. S., 3rd Session	6

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The petition for *certiorari* in the above case having been granted and notice thereof having been served on petitioners only two weeks and two days prior to the hearing, it was impossible to comply with the rules of Court as to time. The record at that time had not been printed and we were at the disadvantage of not having a printed copy of the Transcript of Record before us when preparing the brief.

For the above reasons and for the convenience of the Court, we are printing in this appendix the pertinent portions of the South Carolina Statutes and the Act of Congress involved in this litigation.

Code of Laws of South Carolina, 1932, Vol. II, Page 231. (Act No. 574, Acts of 1928 of the General Assembly, as amended.)

Section 2527. **Business License Tax.**—(1) **Persons, Firms and Corporations Liable.**—Every person, firm or corporation doing business within the State of South Carolina and engaged in the business of selling such articles or commodities as are named in this section, for the privilege of carrying on such business shall be subject to the payment of license tax which shall be measured by and graduated in accordance with the volume of sales of such person, firm or corporation within the State: *Provided,* That every person, firm, corporation, club or association who sells and/or stores and/or receives for the purpose of distribution to any person, firm or corporation, club, association, any shot gun or other shells or cartridges and/or manufactured tobacco products, and/or candy retailing for eighty (80) cents or above, and/or playing cards otherwise taxable under the provisions of sections 2521 to 2554 shall pay the tax at the rates herein provided for the sale of such articles.

* * *

(5) There shall be levied, assessed, collected and paid in respect to the articles containing tobacco enumerated in this section, the following amounts:

(a) **Little Cigars.**—Upon cigars of all descriptions made of tobacco, or any substitute therefor, and weighing not more than three (3) pounds per thousand, one ($0.01) cent for each ten (10) cigars, or fraction thereof.

(b) **Cherots, Stogies, Etc.**—Upon cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three (3) pounds per thousand, retailing for three ($0.03) cents each, or less, three ($3.00) dollars per thousand.

(c) **Cigars.**—Upon cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three (3) pounds per thousand, retailing for over three ($0.03) cents each, ten ($10.00) dollars per thousand.

For the purpose of computing the tax, cheroots, stogies, etc., are hereby classed as cigars.

(d) **Cigarettes.**—Upon all cigarettes made of tobacco or any substitute therefor; upon each package retailing for five ($0.05) cents, or less, one ($0.01) cent; upon each package retailing for more than five ($0.05) cents each, an additional one ($0.01) cent for each five ($0.05) cents, or fractional part thereof of the retail selling price in excess of five ($0.05) cents;

(e) **Snuff and Chewing Tobacco.**—Upon snuff and chewing tobacco, one ($0.01) cent for each three ounces or fractional part thereof;

(f) **Smoking Tobacco.**—Upon all smoking tobacco, including granulated, plug cut, crimp cut, ready rubbed and other kinds and forms of tobacco prepared in such manner as to be suitable for smoking in a pipe or cigarette; upon each package retailing for five ($0.05) cents or less, one ($0.01) cent; upon each package retailing for more than five ($0.05) cents each an additional one ($0.01) cent for each five cents or fractional part thereof of the retail selling price in excess of five ($0.05) cents;

(g) **Cartridges and Shells.**—Upon all shot gun or other shells, four ($4.00) dollars per thousand rounds;

Upon all cartridges, twenty-three (23) Caliber or greater, four ($4.00) dollars per thousand rounds;

(h) **Candy.**—Upon all candy retailing at fifty (50¢) cents per pound and above, one ($0.01) cent for each ten cents or fraction of the retail price: *Provided:* That individual factory-wrapped packages of candy retailing for ten (10) cents, or less, shall not be taxable.

(i) **Playing Cards.**—Upon all playing cards a tax of five ($0.05) cents on each fifty ($0.50) cents or fractional part thereof of the retail selling price, the stamps in all such cases to be affixed to the individual package. . . .

. . .

Section 2532. **Soft Drink Tax.**—Every person, firm or corporation doing domestic or intrastate business within this State and engaging in the business of selling, manufacturing, purchasing, consigning, using, shipping, or distributing, for the purpose of sale within this State, any of the following articles, or things, viz.; soda water, ginger ale, coca-cola, lime-cola, pepsi-cola, near beer, beer, fruit juices, bottled drinks of every kind whatsoever, and all fountain drinks and other beverages and things commonly designated as "soft drinks", for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the sales of such person, firm or corporation within the State of South Carolina except as may hereinafter be provided, as follows: • • •

(b) **Bottled Drinks.**—Any and all soft drinks offered for sale in sealed bottles shall, within twenty-four (24) hours of the time of its manufacture, or receipt in this State, be stamped with South Carolina Soft Drinks License Tax Stamps at the rate of one ($0.01) cents for each five ($0.05) cents or fractional part thereof of the retail selling price, by affixing said stamps at said rate to each individual bottle. That in the case of bottled drinks shipped into South Carolina from a point outside of said State, said stamps shall be affixed to said bottled drinks within twenty-four (24) hours after such bottled drinks come into possession of the person first receiving the same, whether said person be a wholesaler, jobber, distributor, and/or retailer of said products.

Bottled Drinks Taxable.—Bottled soft drinks as referred to in sections 2521 to 2554, shall include any and all beverages whether carbonated or not, such as soda water, ginger ale, nugrape, coca-cola, lime-cola, pepsi-cola, budwine, beer, near beer, fruit juice, milk drinks, when any flavoring or syrup in added, cider, cordial, bottled carbonated water and/or any and all bottled preparations commonly referred to as soft drinks of whatsoever kind and description.

• • •

No. 861

AN ACT to Levy a Tax on the Importation, Receipt, or Acquisition of Tobacco Products, Playing Cards, Cartridges and Shells from Without the State for Use or Consumption Within the State and Penalties for Violation of the Terms Thereof.

Section 1. **License tax on cigars, cheroots, stogies, cigarettes, smoking tobacco, snuff, chewing tobacco, playing cards, cartridges and shells imported or acquired without state for use or consumption within state.**—Be it enacted by the General Assembly of South Carolina: Every person, firm, corporation, club or association within the State of South Carolina importing, receiving, or acquiring from without the State, or from any other cource, cigars, cheroots, stogies, cigarettes, smoking tobacco, snuff, chewing tobacco, playing cards, cartridges or shells for use or consumption within the State shall be subject to payment of license tax at the rates provided for the sale and distribution of such articles in Section 2527 of the Code of Laws of South Carolina, 1932, and Acts amendatory thereto.

Section 2. **Pay tax only once on such articles.**—It is the intent and purpose of this Act that the tax hereby levied shall be paid and collected only once on account of any cigars, cheroots, stogies, cigarettes, or shells sold or imported, received or acquired, for use or consumption and shall be paid by the person, firm, corporation, club or association making the first sale or first importing, receiving or acquiring said articles for use or consumption thereof within this State, and payment of said tax shall be evidenced by stamps purchased from the South Carolina Tax Commission and securely affixed to the package in which such articles are sold or from which used or consumed, denoting the amount of tax thereon as levied by this Act.

Section 3. **Administration and enforcement.**—The administrative provisions and the provisions for the assessment of penalties contained in Sections 2521 to 2554, inclusive, Code of Laws of South Carolina, 1932, wherever

applicable are hereby adopted for the administration, enforcement and collection of the taxes provided in this Act.

Section 4. **Additional.**—This Act is hereby declared to be complementary to and not in conflict with the laws providing for the taxation of the sale of the articles herein enumerated.

Section 5. **Rules and regulations.**—The South Carolina Tax Commission is hereby authorized, empowered and directed to promulgate rules and regulations for the enforcement, collection and payment of the taxes herein levied.

Section 6. This Act shall take effect immediately upon its approval by the Governor.

Approved the 30th day of April, 1938.

(PUBLIC—NO. 819—76TH CONGRESS)
(CHAPTER 787—3D SESSION)
(H. R. 6687)

AN ACT to permit the States to extend their sales, use, and income taxes to persons residing or carrying on business, or to transactions occurring, in Federal areas, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That (a) no person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of Subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

Sec. 2. (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

Sec. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy.

Sec. 4. The provisions of this Act shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

Sec. 5. Nothing in sections 1 and 2 of this Act shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

Sec. 6. As used in this Act—

(a) The term "person" shall have the meaning assigned to it in section 3797 of the Internal Revenue Code.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 10 of the Federal Highway Act, approved June 16, 1936, are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any territory or possession of United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the interior boundaries of any State shall be deemed to be a Federal area located within such state.

Sec 7. (a) Subsection (a) of section 10 of the Federal Highway Act, approved June 16, 1936, is amended—

(1) By striking out the words "upon sales of gasoline and other motor vehicle fuels" and inserting in lieu thereof the words "upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels"; and

(2) By striking out the words "upon such fuels" and inserting in lieu thereof the words "with respect to such fuels."

(b) Subsection (b) of such section 10 is amended by striking out the words "not sold for the exclusive use of the

United States during" and inserting in lieu thereof the words "with respect to which taxes are payable under subsection (a) for."

Approved, October 9, 1940.

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The R. L. Bryan Company. Legal Printers, Columbia, S. C.

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No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1941

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS

v.

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMEY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 619

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS

v.

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMEY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Although the respondents believe the decision below to be correct, they do not oppose the granting of a writ of certiorari in this case.

The court below held that a United States Army Post Exchange is an instrumentality of the

United States and, therefore, expressly excepted from the permission granted to the states by the Act of October 9, 1940, 54 Stat. 1059, to levy certain taxes on federal areas. Accordingly, the tax imposed by Act No. 574 of the General Assembly of the State of South Carolina was held inapplicable to the activities of the United States Army Post Exchange at Fort Jackson, South Carolina.

A conclusion similar to that reached by the court below was reached by the District Court of the United States for the Eastern District of Kentucky in *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35. The decision of the Circuit Court of Appeals for the Fifth Circuit in *Pan American Petroleum Corp.* v. *State of Alabama*, 67 F. (2d) 590, certiorari denied, 291 U. S. 670, may be distinguished but at least in principle is in conflict with the decision below.

These decisions present a question of importance which has arisen in a number of states[1] and an authoritative determination of the issue is desirable.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

OCTOBER 1941.

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[1] Alabama, California, Florida, Michigan, New Jersey, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia.

U. S. GOVERNMENT PRINTING OFFICE 1941

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BRIEF FOR THE RESPONDENTS

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Summary of argument	8
Argument	13
I. The jurisdictional issue	17
II. The nature of the South Carolina Act	21
III. The Act of October 9, 1940, does not authorize the taxation of United States Army Post Exchanges	24
IV. A United States Army Post Exchange is an instrumentality of the United States in the Constitutional sense. It is immune from state taxation and its activities are not subject to state interference through regulatory measures	30
Conclusion	50
Appendix	51

CITATIONS

Cases:

Alabama v. *King & Boozer*, 314 U. S. 1	31
Arizona v. *California*, 283 U. S. 423	34
Brooks v. *Dewar*, 313 U. S. 354	36
Clallam County v. *United States*, 263 U. S. 341	11, 31, 33, 46
Collins v. *Yosemite Park Co.*, 304 U. S. 518	19
Dugan v. *United States*, 34 C. Cls. 458	44, 48
Ex parte Bransford, 310 U. S. 354	20
Ex parte Hobbs, 280 U. S. 168	20
Falls City Brewing Co. v. *Reeves*, 40 F. Supp. 35	49
Federal Housing Administration v. *Burr*, 309 U. S. 242	46
Gratiot v. *United States*, 4 How. 80	36
Graves v. *New York ex rel. O'Keefe*, 306 U. S. 466	32
Hunt v. *United States*, 278 U. S. 96	31
James v. *Dravo Contracting Co.*, 302 U. S. 134	19, 32, 34
Johnson v. *Maryland*, 254 U. S. 51	34
Keane v. *United States*, 272 Fed. 577	49
King County, Wash. v. *United States Ship. Board E. F. Corp.*, 282 Fed. 950	46
Lee v. *Osceola Imp. Dist.*, 268 U. S. 643	31
McCulloch v. *Maryland*, 4 Wheat. 316	31

Cases—Continued.	Page
Minnesota v. *Risting*, decided March 30, 1942 (C. C. A. 8th)	39
Mullen Benevolent Corp. v. *United States*, 290 U. S. 89	31
N. Y. ex rel. Rogers v. *Graves*, 299 U. S. 401	48
New Brunswick v. *United States*, 276 U. S. 547	31
Ohio v. *Thomas*, 173 U. S. 276	31
Osborn v. *United States Bank*, 9 Wheat. 738	31
Pan American Petroleum Corp. v. *Alabama*, 65 F. (2d) 590, certiorari denied, 291 U. S. 670	49
People v. *Standard Oil Co.*, 218 Cal. 123, reversed on other grounds, 291 U. S. 242	49
Phillips v. *United States*, 312 U. S. 246	18, 20, 21
Pierce v. *United States*, 314 U. S. 306	49
Silas Mason Co. v. *Tax Comm'n*, 302 U. S. 186	36
Sloan Shipyards v. *U. S. Fleet Corp.*, 258 U. S. 549	46
Standard Oil Co. of California v. *Johnson*, No. 1125, this Term	24
Standard Oil Co. v. *California*, 291 U. S. 242	14, 24
Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10	9, 16, 18, 21
Sullivan v. *United States*, 92 C. Cls. 154	44
Surplus Trading Co. v. *Cook*, 281 U. S. 647	24
Thirty-First Infantry Post Exchange v. *Posadas*, 54 Phil. 866, certiorari denied, 283 U. S. 839	49, 50
Thornton v. *United States*, 271 U. S. 414	40
United States v. *Eliason*, 16 Pet. 291	36
United States v. *Freeman*, 3 How. 556	36
United States v. *Pearson*, 231 Fed. 270	44
United States v. *Query*, 21 F. Supp. 784	39
United States v. *Rickert*, 188 U. S. 432	44
Van Brocklin v. *Tennessee*, 117 U. S. 151	11, 31
Yearsley v. *Ross Constr. Co.*, 309 U. S. 18	34
Woog, Admr. v. *United States*, 48 C. Cls. 80	49
Statutes:	
Act of July 28, 1866, c. 299, 14 Stat. 332	35
Resolution of March 30, 1867, 15 Stat. 29	35
Act of July 15, 1870, c. 294, 16 Stat. 315, 319, Sec. 20	35
Act of March 1, 1875, c. 115, 18 Stat. 337	36
Act of January 28, 1893, c. 51, 27 Stat. 426	35
Act of March 2, 1903, c. 975, 32 Stat. 927	36
Act of April 23, 1904, c. 1485, 33 Stat. 259	37
Act of March 2, 1905, c. 1307, 33 Stat. 827	37
Act of June 12, 1906, c. 3078, 34 Stat. 240	37
Act of March 2, 1907, c. 2511, 34 Stat. 1158	37
Act of May 11, 1908, c. 163, 35 Stat. 106	37
Act of March 3, 1909, c. 252, 35 Stat. 732	37
Act of March 23, 1910, c. 115, 36 Stat. 243	37
Act of March 3, 1911, c. 209, 36 Stat. 1037	37
Act of August 24, 1912, c. 391, 37 Stat. 569	37
Act of March 2, 1913, c. 93, 37 Stat. 704	37

Statutes—Continued.

	Page
Act of April 27, 1914, c. 72, 38 Stat. 351	37
Act of March 4, 1915, c. 143, 38 Stat. 1062	37
Act of August 29, 1916, c. 418, 39 Stat. 619	37
Act of May 12, 1917, c. 12, 40 Stat. 40	37
Act of June 15, 1917, c. 29, 40 Stat. 182	37
Act of October 6, 1917, c. 79, 40 Stat. 345	37
Act of March 28, 1918, c. 28, 40 Stat. 459	37
Act of July 8, 1918, c. 139, 40 Stat. 821	37
Act of July 9, 1918, c. 143, 40 Stat. 845	37
Act of November 4, 1918, c. 201, 40 Stat. 1020	37
Act of July 11, 1919, c. 8, 41 Stat. 104	37
Act of June 5, 1920, c. 240, 41 Stat. 948	37
Act of June 30, 1921, c. 33, 42 Stat. 68	37
Act of June 30, 1922, c. 253, 42 Stat. 716	37
Act of March 2, 1923, c. 178, 42 Stat. 1377	37
Act of June 7, 1924, c. 291, 43 Stat. 477	37
Act of February 12, 1925, c. 225, 43 Stat. 892	37
Act of April 15, 1926, c. 146, 44 Stat. 254	37
Act of February 23, 1927, c. 167, 44 Stat. 1106	37
Act of March 23, 1928, c. 232, 45 Stat. 326	37
Act of February 28, 1929, c. 366, 45 Stat. 1349	37
Act of July 3, 1930, c. 862, 46 Stat. 1014	37
Act of July 21, 1932, c. 520, 47 Stat. 709	37
Act of March 4, 1933, c. 281, 47 Stat. 1571	38
Act of June 26, 1934, c. 756, 48 Stat. 1224	38
Hayden-Cartwright Act (Act of June 16, 1936, c. 582, 49 Stat. 1519, 1521), Sec. 10	39
Act of June 28, 1937, c. 383, 50 Stat. 319, Sec. 4	39
Act of October 9, 1940, c. 787, 54 Stat. 1059:	
Sec. 1 (U. S. C. 1940 ed., Title 4, Sec. 13)	10, 14
2 (U. S. C. 1940 ed., Title 4, Sec. 14)	10, 14, 78
3 (U. S. C. 1940 ed., Title 4, Sec. 15)	10, 14, 24, 25, 27, 29, 79
4 (U. S. C. 1940 ed., Title 4, Sec. 16)	79
Judicial Code, Sec. 266 (U. S. C., Title 28, Sec. 380)	17, 50
Code of Laws of South Carolina (1932), Vol. II (Act No. 574, Acts of 1928 of the General Assembly, as amended):	
Sec. 2527	22, 23, 51
2528	22, 23, 61
2529	22, 63
2530	64
2532	22, 64
2533	22, 67
2534	23, 68
2537	23, 68
2538	23, 69

Statutes—Continued.
Code of Laws of South Carolina, Act—Continued. Page
Sec. 2539 ..... 22, 23, 70
2540 71
2542 ..... 22, 71
2546 ..... 22, 75
2547 76
2548 76
2552 77
Miscellaneous:
A. R. 210–65, July 1, 1941 40
A. R. 210–65, *C3:
Par. 7½ 26, 43
8 (d) 43
8 (e) 43
46 41
A. R. 210–65 ..... 39, 40, 47
A. R. 210–50 42
A. R. 210–50, *C1 42
Circular No. 5, January 23, 1902, Hdqrs. of the Army, Washington 47
Executive Order No. 6589, dated February 6, 1934 48
General Orders No. 10, Adjutant General's Office, February 1, 1889 35
General Orders 46, Hdqrs. of the Army, July 25, 1895 35
Hearings, House and Senate, War Department Appropriation Act, 1934, 72d Cong., 2d Sess., p. 648 38
39 Op. Atty. Gen. 316, 319 48
37 Op. Atty. Gen. 435 48
S. S. T. 385, 1940–1 Cum. Bull. 202 47
S. T. 620, XII–1 Cum. Bull. 419 (1933) 47
Senate Hearings before the Committee on Education and Labor on S. 2102, 75th Cong., 1st Sess., pp. 47–48 38
S. Rep. No. 1625, 76th Cong., 3d Sess., pp. 3–4 27

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of South Carolina (R. 17–26) is reported in 37 F. Supp. 972. The *per curiam* opinion of the Circuit Court of Appeals

for the Fourth Circuit (R. 31) is reported in 121 F. (2d) 631.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 27, 1941 (R. 32). The petition for a writ of certiorari was filed September 16, 1941, and was denied by this Court November 17, 1941. By order of the Court entered April 14, 1942, the order denying the writ was vacated and the petition was granted (R. 34). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether this was a proper case for a three-judge District Court within section 266 of the Judicial Code.

2. Whether a United States Army Post Exchange located within an area over which exclusive jurisdiction has been vested in the United States is by virtue of the Act of October 9, 1940, c. 787, 54 Stat. 1059, subject to the licenses, taxes and regulations imposed by Act No. 574 of the Acts of 1928 of the General Assembly of the State of South Carolina, as amended.

3. Whether a United States Army Post Exchange not located within an area over which exclusive jurisdiction has been vested in the United States is immune under the Federal Constitution from the licenses, taxes, and regulations imposed by the foregoing statutes of South Carolina.

STATUTES INVOLVED

The relevant parts of the Act of October 9, 1940, c. 787, 54 Stat. 1059, and of Act No. 574 of the Acts of 1928 of the General Assembly of the State of South Carolina, as amended, are set forth in the Appendix, *infra*, pp. 51–79.

STATEMENT

This suit was brought in the District Court by the United States and two officers of the United States Army (Major General Henry D. Russell, the Commanding General at Fort Jackson, South Carolina, and Major William R. Tomy, the Post Exchange Officer at Fort Jackson) against Walter G. Query and the other members of the South Carolina Taxing Commission. The amended complaint prayed that the defendants be enjoined from enforcing the provisions of Act No. 574, Acts of 1928, of the General Assembly of the State of South Carolina, as amended, against United States Army Post Exchanges and other similar agencies identified with the armed forces of the United States. The South Carolina legislation in question required that a license be obtained by anyone engaged in purchasing, selling, or distributing specified commodities, and imposed a tax measured by the amount of sales; provision was also made for the exercise of broad regulatory powers by the State Taxing Commission, including revocation of licenses, seizure of articles, examination of books and records, etc. The amended complaint further

requested that the court adjudge the provisions of the South Carolina Act inapplicable to the purchases, sales, etc. of the Post Exchanges and other agencies, and concluded by asking for an interlocutory injunction pending the final hearing (R. 5).

The complainants alleged that the defendants were threatening to enforce the state Act against the Post Exchanges and other agencies in reliance upon Public, No. 819, 76th Cong., 3d Sess. (Act of October 9, 1940, c. 787, 54 Stat. 1059) (R. 3). The Federal statute undertook to authorize the imposition of specified state taxes within areas otherwise subject to the exclusive territorial jurisdiction of the United States. The complainants alleged, however, that the taxes here in controversy were not authorized by the Federal statute, and that the South Carolina Act as applied to the purchases and sales by the Post Exchanges and the other agencies is repugnant to the Constitution of the United States as an interference with the activities of the United States Government (R. 3). The complainants further alleged that unless the enforcement of the state statute be enjoined the Post Exchanges and other agencies would be subjected to repeated proceedings and interference in the performance of their lawful functions, and that there is no plain, speedy, and efficient remedy at law or in equity against the defendants in the South Carolina courts.

The defendants' answer admitted that they were threatening to enforce the state Act against Post

Exchanges and other agencies,[1] but that such action was constitutional and that the territorial immunity of these agencies had been removed by the Act of October 9, 1940. The answer, in addition, admitted that the District Court had jurisdiction and that complainants were without any plain, speedy, or efficient remedy at law (R. 5–9).

The parties stipulated in effect that the case might be limited to Army Post Exchanges, and that the relief granted with respect to the Army Post Exchanges would also be accorded to the other agencies in controversy, namely, Marine Corps Post Exchanges, Ships' Service Stores, Officers' Clubs, and Noncommissioned Officers' Clubs (R. 10–11).

Following the granting of a temporary restraining order by the District Court, a court of three judges was convened for the trial of the case, it being agreed by the parties that the hearing should be on the merits for a final decree (R. 18). Upon that hearing it appeared to the three members of the court that the complainants were without any "plain, speedy, and efficient remedy at law or in equity in the courts of South Carolina," within the meaning of Section 24 (1) of the Judicial Code, as amended by the Act of August 21, 1937 (R. 24–25), and that they were entitled to the relief

[1] It denied, however, that it was seeking to enforce the State Act against Commissaries or Ships' Stores (R. 7), and the issue as to those agencies was in effect removed from the case by stipulation (R. 9–10).

sought. It also appeared to the members of the court, however, that the instant proceeding did not present a case for a three-judge court under Section 266 of the Judicial Code, since "everyone concedes that the state taxing statute cannot be applied so as to tax a federal instrumentality without the consent of Congress and that the federal statute does not give consent to the taxing of federal instrumentalities" (R. 25). In the view of the members of the court, the attack was hence made not upon the constitutionality of the State Act or upon any order of the State Commission, but only upon the alleged unlawful action of the State Commission and that "nothing is involved in this case except the determination of the status of the post exchanges within the meaning of" the Federal Act of October 9, 1940[2] (R. 25). The members of the court accordingly concluded that the district judge had exclusive jurisdiction of the case; but inasmuch as the other two judges agreed with him as to the findings and decree it was decided out of an abundance of caution that they should be signed by all three judges (R. 25–26). Accordingly, the findings of fact and con-

[2] The court erred in assuming that the Government was attacking the South Carolina Act solely on the ground of territorial jurisdiction, to which the Act of October 9, 1940, was relevant. The Government also charged that the state Act was invalid, irrespective of extra-territoriality, by reason of its interference with Federal functions. The Act of October 9, 1940, does not have any relevance with respect to that question.

clusions of laws entered by the court as well as the decree were signed by the three judges who heard the case; the opinion was signed by the district judge with the remaining two judges noting their concurrence in it (R. 16, 26, 27).

The findings of the District Court (R. 11–15) undertake to summarize the organization and nature of Post Exchanges. They disclose that a Post Exchange is established pursuant to Army Regulations, promulgated by the Secretary of War; that the Commanding Officer at each Post Exchange has complete jurisdiction over the conduct of its affairs; that sales are made only under Army Regulations to officers, enlisted men, and other specified persons closely related to the operation of the military post; that the purposes of an Exchange are to supply troops at lowest possible prices with articles of ordinary wear and use not supplied by the Government, to afford a means of recreation, and through exchange profits to provide, when necessary, the means for improving the company messes; that the Post Exchange is governed by a council consisting of Army officers; that the Post Exchange Officer is detailed by the Commanding Officer and receives no compensation for his services; that under the regulations of the Secretary of War the duties imposed upon officers in the management of exchange affairs are as binding upon them as any other military duty; that five percent of the profits may be set aside for

the constituent members of an exchange (i. e., companies, troops, batteries, squadrons, etc., but not any individuals) and the balance distributed to the recreation fund, etc.; that on one occasion Congress required balances of Post Exchange funds amounting to $298,068 to be covered into the Federal Treasury upon the dissolution of the constituent military organizations; that Post Exchange buildings have been constructed with War Department funds; that Congress has repeatedly made appropriations for Post Exchanges; that building supplies, etc., have been furnished by the Quartermaster Corps; that Post Exchange messages may be transmitted without charge through War Department telegraph, radio, and cable facilities; and that the Post Exchange enjoys the use of the frank.

The defendant members of the State Taxing Commission took an appeal to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the decree of the District Court (R. 31).

SUMMARY OF ARGUMENT

I

The injunction sought by the Government against the state taxing officials is based upon two grounds: (1) that the state Act as applied to a Post Exchange located upon an exclusively federal area is unconstitutional by reason of extraterritoriality, and that Congress has not by the Act of October 9, 1940 consented to the imposition of state

taxes upon Post Exchanges within such an area; and (2) that the state Act as applied to a Post Exchange, wherever located, is unconstitutional by reason of the inherent Federal immunity from state taxation and regulation.

Since the application of the state Act to Post Exchanges was thus challenged as unconstitutional it would seem that this was an appropriate case for a three-judge District Court, and that the Circuit Court of Appeals was without jurisdiction to hear the appeal. *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10. Although the first ground involves an auxiliary question of statutory construction, it is primarily a constitutional ground; and in any event, the second ground is based solely upon constitutional considerations. In these circumstances, the decree of the District Court was properly signed by the three judges and the appeal to the court below was improper.

II

The legal incidence of the taxes, licenses and other regulatory provisions of the state Act falls directly upon the Post Exchanges. Although it is true that some taxes levied by the state Act may be imposed upon manufacturers or distributors who sell to the Post Exchanges, those taxes are not involved in this case; the Government is here challenging simply those taxes that are imposed directly upon the Post Exchanges.

III

To the extent that any Post Exchange is located upon an exclusively federal area, the state Act cannot constitutionally be applied against it. The State apparently recognizes this and places its sole reliance upon the Act of October 9, 1940 as conferring consent upon the states to impose taxes upon Post Exchanges within such areas.

Although Sections 1 and 2 of the Act of October 9, 1940, did contain congressional consent to the imposition of specified state taxes within such areas, Section 3 (a) carefully excluded from that consent any taxes imposed with respect to sales made by "the United States or any instrumentality thereof to any authorized purchaser". And Section 3 (b) defined "authorized purchaser" as a person who is permitted to make purchases "from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy". But a Post Exchange is just such a voluntary unincorporated organization of Army personnel, and the regulations of the Secretary of War with respect thereto specify in minute detail who may or may not make purchases from a Post Exchange. Reading Section 3 (a) and 3 (b) together, it seems clear that Congress intended the term "instrumentality" to comprehend a Post Exchange.

Accordingly, to the extent that a Post Exchange is located on exclusively federal territory, the states are without jurisdiction to impose such taxes, and Congress has not by the Act of October 9, 1940, consented to the extension of the states' jurisdiction in this regard.

IV

Finally, even if a Post Exchange is within the territorial jurisdiction of the State, it is nevertheless constitutionally immune from the South Carolina taxing and regulatory provisions.

The United States itself is constitutionally immune from state taxation (cf. *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Clallam County* v. *United States*, 263 U. S. 341), and an Army Post Exchange is entitled to like constitutional protection. In the exercise of its constitutional functions the United States often acts through agencies or instrumentalities that have a separate juristic existence, such as the Tennessee Valley Authority or the Reconstruction Finance Corporation. No private person has any interest in such agencies, and in their relation to the states in the constitutional sense they enjoy the same status as that of the United States itself. Thus in the *Clallam County* case, the United States owned all the stock of a corporation whose property was held constitutionally immune from state taxation, where the corporation was employed by the Government in aiding the prosecution of the World War.

Similarly here, the United States Army Post Exchange is a federal instrumentality which is entitled to like constitutional protection against state taxation or interference. The Post Exchange is simply a unit within the War Department whose existence is regarded as essential to the efficient management of the Army as well as to the maintenance of Army morale. No private person has any interest in a Post Exchange, and it is operated under regulations of the Secretary of War which govern its activities down to the minutest detail. Each Post Exchange is subject to the control of the Commanding Officer, and the various army officers detailed to each Post Exchange serve without additional compensation. Congress has repeatedly made appropriations on behalf of Post Exchanges, and in 1933 and 1934 it required that various balances of Post Exchange funds aggregating some $298,000 be covered into the Federal Treasury upon dissolution of the member military organizations. Post Exchange buildings have frequently been constructed with War Department funds, and building supplies have been furnished by the Quartermaster Corps. Post Exchange messages are transmitted without charge over War Department lines, and Post Exchanges enjoy the use of the frank. Although Post Exchanges are permitted to make a small profit upon their sales, that profit is not available to any individual but is used for purposes prescribed in the army regulations, such

as improving the messes and otherwise promoting Army morale.

In these circumstances, we submit that an intrusion into the affairs of a Post Exchange is in substance and effect an intrusion into the affairs of the United States, and that the South Carolina Act as applied is invalid.

ARGUMENT

Preliminary.—This suit was brought to enjoin the enforcement of the South Carolina license tax and its regulatory provisions as applied to United States Army Post Exchanges and similar agencies identified with the armed forces of the United States and for a declaratory judgment as to the invalidity of the state statute as so applied. By stipulation of the parties it was in effect agreed that the litigation might be limited to Army Post Exchanges and that whatever relief might be given with respect to such Post Exchanges would likewise be given on behalf of the other agencies in controversy[3] (R. 10–11). The District Court accordingly restricted its consideration to Army Post Exchanges, and in particular to the Post Exchange at Fort Jackson.

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[3] Two types of agencies, Commissaries and Ships' Stores, were eliminated from the case at the outset by stipulation (R. 9–10). In addition to the Army Post Exchanges, there remained in controversy, however, Marine Corps Post Exchanges, Ships' Service Stores, Officers' Clubs, and Noncommissioned Officers' Clubs (R. 10).

It was assumed by the courts below that Fort Jackson is situated on a military reservation subject to the exclusive territorial jurisdiction of the United States. However, since the record does not disclose that fact,[28a] and since other Post Exchanges within the external boundaries of South Carolina may or may not be located on territory subject to the exclusive jurisdiction of the United States, we shall undertake to discuss this case upon alternative assumptions as to territorial jurisdiction.

Upon the assumption that the Post Exchange is located within an area subject to the exclusive jurisdiction of the United States, the South Carolina statutes could not constitutionally have any operative effect within such area (*Standard Oil Co.* v. *California,* 291 U. S. 242), unless Congress has consented. And in this case it is urged by the State that the Act of October 9, 1940, c. 787, 54 Stat. 1059 (see Appendix, *infra,* pp. 78–79) supplied that consent. Although it is true that Sections 1 and 2 of that Act did undertake to permit the levy of state sales, use, and income taxes within such areas, Section 3 (a) specifically provided that the statute shall "not be deemed to au-

[28a] Upon inquiry, we are informed that the original reservation at Fort Jackson is within the exclusive jurisdiction of the United States, but that additional adjacent areas have recently been acquired that are not subject to the exclusive jurisdiction of the United Sttaes, and that the main office and warehouse of the Post Exchange is located upon the original reservation, although some of the branches are located on the newly acquired lands.

thorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser." Section 3 (b) thereupon defined an "authorized purchaser" as one who is permitted to make purchases from "commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy." It is our position that a Post Exchange, an unincorporated organization of Army personnel established pursuant to regulations of the Secretary of War, is an instrumentality of the United States within the meaning of Section 3 (a), and that therefore the Act of October 9, 1940, does not confer upon the State the authority to legislate with respect thereto. The consequence of this interpretation of the statute is that it leaves South Carolina just where it was before the statute was enacted, namely, without any constitutional authority to impose upon the Post Exchange any taxes or to subject it to any concomitant regulatory provisions.

In the alternative, upon the assumption that the Post Exchange is not within an exclusively federal area, it is the Government's position that the Post Exchange is nevertheless a Federal instrumentality, operated by the War Department, and is there-

fore constitutionally immune from state taxation or from interference by state regulatory laws.

It is thus clear that the injunction sought in this proceeding could be granted only on either of two grounds: (a) that the South Carolina Act as applied to Post Exchanges on exclusively federal territory is unconstitutional since it would operate on areas outside its jurisdiction, Congress not having consented to its operation within those areas; and (b) that the South Carolina Act as applied to Post Exchanges wherever located is unconstitutional since the State may not tax a federal instrumentality or subject it to regulation. Both grounds proceed upon the theory that the South Carolina legislation is unconstitutional, as applied to Post Exchanges. It would therefore seem that this was an appropriate case for a three-judge District Court.

The District Court, however, thought that this was a case for one judge, but in recognition of the doubt (R. 25–26), the decree as well as findings of fact and conclusions of law were signed by three judges (R. 11–16, 26–27). An appeal was then taken to the Circuit Court of Appeals, as though from a one-judge court, in accordance with the suggestion of the District Court, and the case is here on certiorari to the Circuit Court of Appeals.

We think it questionable whether the correct appellate procedure was followed in this case. And since the question is one that goes to the power of the courts and is not dependent upon whether the parties raise the issue (*Stratton* v. *St. Louis S. W.*

Ry., 282 U. S. 10, 13), we shall discuss in Point I the question whether the case is properly before this Court. Then, upon the assumption that the case is properly here, we shall discuss in Point II the nature of the South Carolina legislation involved. In Point III we shall undertake to show that the provisions of the South Carolina statutes may not be applied to Post Exchanges located within exclusively federal areas, the Act of October 9, 1940, notwithstanding. Finally, in Point IV, we shall endeavor to demonstrate that the South Carolina tax and regulatory provisions are unconstitutional as applied to Post Exchanges, wherever located.

I

THE JURISDICTIONAL ISSUE

Since the complainants in the District Court sought an interlocutory as well as permanent injunction against the enforcement of the South Carolina Act as applied to Army Post Exchanges, and since the relief sought was predicated upon the unconstitutionality of the state Act, as applied, it would seem that this was a proper case for a three-judge district court. Section 266 of the Judicial Code provides:

> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or exe-

> cution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. (U. S. C., Title 28, Sec. 380).

Where the injunction is sought merely because of the unlawful action of state officials and where there can be no contention that a state statute is invalid as applied, the case is not one for a three-judge court. *Phillips* v. *United States,* 312 U. S. 246. But where, as here, the injunction is sought on the ground that the state statute as applied is unconstitutional, the case falls within the category of controversies that must be heard by a district court of three judges. *Stratton* v. *St. Louis S. W. Ry.,* 282 U. S. 10. And as shown by the *Stratton* case, the question is one that need not be raised by the parties, for it goes to the very validity of the decree of the District Court and the mode of appellate review therefrom.

Upon presentation of the Government's complaint and amended complaint herein a district court of three judges was called together and it heard the case. The procedure was a familiar one and it followed the pattern of such well known cases as *James* v. *Dravo Contracting Co.*, 302 U. S. 134, where a state tax was challenged as an unconstitutional interference with a federal function, and *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, where a state statute was assailed as unconstitutional as applied to transactions on a federal reservation. Questions of both types are involved herein, for the state statute is here attacked upon grounds of intergovernmental immunity as well as upon grounds of extra-territoriality.[4]

The District Court itself was not entirely certain as to the correct procedure, for although it

[4] The latter ground also involves a question of construction of the Act of October 9, 1940. But it is not disputed that the state is without constitutional power to levy taxes upon an exclusively federal area in the absence of that statute, and if the statute fails to confer that power upon the state, it is left just where it was before the statute was enacted, namely without any power to legislate in respect of transactions occurring on such an area. The primary question is therefore one of constitutional law and the construction of the statute is merely auxiliary to that primary question.

In any event, however, the question with respect to the other ground is purely one of constitutional inter-governmental immunity, unencumbered by any collateral issue of statutory construction.

opined that the case should have been heard by one judge, all three judges signed the decree out of an abundance of caution (R. 25, 27). In stating that the case was one for a single judge, the court referred to the *Phillips* case, noted above, p. 18, and two other cases, *Ex parte Bransford,* 310 U. S. 354, and *Ex parte Hobbs,* 280 U. S. 168.

We have carefully examined the *Bransford* case and are not entirely clear as to the scope of its holding. The following excerpt from the opinion was evidently intended by the Court as a statement of the essence of the case (310 U. S. at 361):

> It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court,[15] and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court.[16] * * *

Footnote 15 cited the *Stratton* case and footnote 16 the *Hobbs* case.[5] If we understand the distinction correctly the instant case falls within the rule of the *Stratton* case, for here, as in the *Stratton*

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[5] The situation in the *Hobbs* case is also not entirely clear, but the Court apparently treated the case as though it involved only a question of construction of the state statute rather than a question of its constitutionality. See 280 U. S. at 172.

case, the state Act "as applied" is challenged as unconstitutional.

Accordingly, if the *Stratton* case is applicable, the Circuit Court of Appeals had no jurisdiction to hear the appeal, and the case should be remanded to that court with instructions to dismiss the appeal for want of jurisdiction, as was done in the *Stratton case*, 282 U. S. at 18. However, we have no objection to any such remedial disposition of the case as was made in *Phillips* v. *United States*, 312 U. S. at 254, or to any other treatment of this question that will cure the jurisdictional defect. We raise the issue solely because we believe that it goes to the power of the court below to hear the case, and we think that it is an obstacle that must be overcome before the merits can be reached here.

If the court below had jurisdiction and the case may properly be considered here on the merits, we present in the following portion of the brief, a discussion of the nature of the South Carolina Act and of its validity as applied to Post Exchanges.

II

THE NATURE OF THE SOUTH CAROLINA ACT

Act No. 574 of the Acts of 1928 of the General Assembly of South Carolina, as amended, provides that every person, firm, or corporation engaged in the business of selling or distributing certain named articles shall be subject to the payment of

a license tax at prescribed rates graduated in accordance with the volume of sales. Code of Laws of South Carolina, as amended, Sections 2527, 2532, 2542 (1), *infra*, pp. 51, 64, 71. The articles with respect to which the tax is imposed include cigars, cigarettes, and a variety of other tobacco products, playing cards, beer, and soft drinks. Sections 2527 (5), 2532, 2533, 2542 (1), *infra*, pp. 54, 64, 67, 71. As a condition precedent to engaging in the sale of tobacco products, the vendor, including a seller at retail, is required to secure a license from the South Carolina State Tax Commission, which may also be revoked by it. Sections 2527 (2) and (3), *infra*, pp. 51, 53. The Act contemplates that the prescribed tax shall be paid by the first person, firm or corporation to offer the article for sale within the State, whether as manufacturer, wholesaler, dealer, distributor, or retail dealer, except in the case of foundain drinks and similar items, with respect to which the tax is imposed solely upon the vendor making the sale to the final consumer. Sections 2527 (7), 2542 (1) (3), *infra*, pp. 57, 71, 73. Vendors, including sellers at retail, are required to maintain elaborate records, which, together with the commodities on hand, are subject to inspection on the premises by the Commission. Sections 2528 (1), 2529, 2539 (4), 2542 (4), 2546, *infra*, pp. 61, 63, 70, 74, 75. With respect to certain soft drinks, the Commissioner may also require the filing of returns. Section 2533, *infra*,

p. 67. The Commission is empowered to confiscate articles with respect to which the tax has not been paid, to confiscate vehicles other than common carriers transporting such articles, and to issue regulations for the enforcement of the Act. Sections 2527 (8) and (11), 2538, *infra*, pp. 58, 60, 69. In addition, civil and criminal penalties are provided for violation of various sections of the Act. Sections 2527 (4), 2528 (1) and (4), 2534, 2537, 2539 (4), *infra*, pp. 53, 61, 62, 68, 70.

As appears from the findings of fact (R. 12), Post Exchanges are engaged as vendors in the sale of a wide variety of articles to Army personnel for consumption by them. Apart from federal limitations, they are in consequence subject to the licensing and regulatory provisions of the state Act, are subject to visitations by agents of the State Tax Commission, and must answer to the tax collector for the sale of all articles except those procured from manufacturers or wholesalers within South Carolina upon which the tax has already been paid. Petitioners' answer admitted that they were seeking to enforce the state Act against the Post Exchanges and other agencies involved (R. 7–8). To the extent that the Post Exchange buys articles from South Carolina vendors upon which the tax has already been paid by them, the decree is, of course, inapplicable since it restrains only the enforcement of the state Act "against" the Post Exchange and

other agencies named in the amended complaint (R. 26–27).

We have here, then, a case where the legal incidence of the state taxes in issue falls directly upon the Post Exchange,[6] and, if we are right in our position, directly upon a federal instrumentality. The preliminary test as to whether any federal interest is threatened by the imposition of the state taxing measure is thus fully satisfied.

III

THE ACT OF OCTOBER 9, 1940, DOES NOT AUTHORIZE THE TAXATION OF UNITED STATES ARMY POST EXCHANGES

To the extent that any Post Exchange is located upon a reservation subject to the exclusive jurisdiction of the United States it is beyond the reach of the state Act. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *Standard Oil Co.* v. *California*, 291 U. S. 242. Respondents seek to overcome that result only by resort to the Act of October 9, 1940, in which Congress undertook to permit states to levy certain taxes within an exclusively federal area. That permission, however, was strictly limited by Section 3 which provides:

> SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to

[6] In this crucial respect the South Carolina tax is to be sharply distinguished from the tax involved in *Standard Oil Co. of California* v. *Johnson*, No. 1125, this Term. See the Government's brief as *amicus curiae* in that case.

authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy.

Thus, Section 3 (a) expressly excludes from the grant of authority to the states, taxes imposed upon sales made by "the United States or any instrumentality thereof to any authorized purchaser." Although Section 3 (a) does not define the term "instrumentality," Section 3 (b) sheds strong light upon its meaning. Section 3 (b) defines an "authorized purchaser" as one who is permitted to make purchases "from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy." But an Army Post Exchange is a voluntary unincorporated organization of Army personnel established under the authority of the War Department, and it may sell

only to persons specifically authorized by regulations promulgated by order of the Secretary of War. AR 210–65, *C 3, par. 7½. Reading Section 3 (a) and 3 (b) together, it seems abundantly clear that Congress regarded "commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel" as either the United States or its instrumentalities. Consistent with this understanding, the parties have stipulated that commissaries and ship's stores are instrumentalities of the United States (R. 9–10). And since, as the findings make clear, United States Army Post Exchanges fit the description of "voluntary unincorporated organizations of Army * * * personnel," it seems equally plain that Congress regarded a Post Exchange as a federal instrumentality for the purpose of the Federal Act.

In authorizing the states to impose their taxes within areas over which exclusive jurisdiction had been vested in the United States, Congress had complete power to frame the grant on its own terms. It could use the expression "instrumentality" in any sense it saw fit and could include an Army Post Exchange within that expression whether or not such an agency should be considered an instrumentality of the United States in the field of constitutional immunity. With respect to Post Exchanges located within exclusively federal areas, the Federal Act on its face would therefore

seem to foreclose further inquiry. Whether or not they are instrumentalities in the constitutional sense, the states have no jurisdiction to tax them when they are located on exclusively federal areas, and the Act of October 9, 1940, does not confer any such jurisdiction.

The provisions of Section 3 (a) and (b) so plainly appear to cover a Post Exchange that resort to legislative history would not seem to be warranted. But even if the legislative history be examined nothing appears which would place a Post Exchange outside the statute. At most, a doubt is raised in the report of the Senate Committee, which reads as follows (S. Rep. No. 1625, 76th Cong., 3d Sess., pp. 3–4):

> Section 3 of the committee amendment provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. This section also provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser. An authorized purchaser being a person who is permitted, under regulations of the Secretary of War or Navy, to make purchases from commissaries, ship's stores, or voluntary unincorporated organizations of Army

or Navy personnel, such as post exchanges, but such person is deemed to be an authorized purchaser only with respect to such purchases and is not deemed to be an authorized purchaser within the meaning of this section when he makes purchases from organizations other than those heretofore mentioned.

For example, tangible personal property purchased from a commissary or ship's store by an Army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the State income taxes by virtue of section 2 of the committee amendment.

It will be observed that this report does not state that a Post Exchange is not an "instrumentality" within the meaning of the statute. By some process of reasoning, however, the author of the report seems to have been under the misapprehension that only this Court could define the term "instrumentality" and, therefore, deferentially refrained from characterizing a Post Exchange as a federal instrumentality in the absence of an authoritative decision of this Court. Yet it seems that even the author of the report probably regarded a Post Exchange as covered by the statute unless this Court should rule otherwise.

In these circumstances, we respectfully submit that the plain language of the statute should govern and that there is no occasion to look to the legislative history which at most raises only an elusive doubt.

However, if the Court should ignore Section 3 (b), and conclude that a Post Exchange is an "instrumentality" of the United States within the meaning of Section 3 (a) only if it is constitutionally immune from state taxation, then we respectfully refer the Court to our discussion under Point IV where we contend that a Post Exchange may not constitutionally be subjected to state taxation, whether or not located on an exclusively federal reservation.

IV

A UNITED STATES ARMY POST EXCHANGE IS AN INSTRUMENTALITY OF THE UNITED STATES IN THE CONSTITUTIONAL SENSE. IT IS IMMUNE FROM STATE TAXATION AND ITS ACTIVITIES ARE NOT SUBJECT TO STATE INTERFERENCE THROUGH REGULATORY MEASURES

In Point III we contended that a Post Exchange located upon an exclusively federal area is beyond the reach of the state Act and that Congress did not consent by the Act of October 9, 1940, to the extension of state jurisdiction over such a Post Exchange. We now contend that even if a Post Exchange is not beyond the territorial jurisdiction of the state, it is neverthless constitutionally immune from the taxing and regulatory provisions of the South Carolina Act. As shown in Point II, *supra*, pp. 21–24, that Act not only imposes various excises, the legal incidence of which falls directly upon the Post Exchange, but it sets up a licensing system whereby a separate license must be procured for each post exchange as well as for each of its branches, and broad regulatory powers are entrusted to the State Tax Commission in the enforcement of the Act.

It is our position that the Act could not be constitutionally applied directly to the United States itself, and that the Post Exchange, which is simply an arm of the War Department, is such an instrumentality of the United States as to be entitled to like immunity.

1. *Introductory.*—We must, of course, take as our starting point the fundamental proposition that the United States itself, in the absence of express waiver by Congress, is immune from state taxation and regulation. It is a result that stems from the general structure of the Federal Government established by the Constitution as well as from the supremacy clause of Article VI, and has long been recognized in the decisions of this Court. *McCulloch* v. *Maryland,* 4 Wheat. 316, 429, 430–436; *Osborn* v. *United States Bank,* 9 Wheat. 738; *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *Clallam County* v. *United States,* 263 U. S. 341; *New Brunswick* v. *United States,* 276 U. S. 547; *Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643, 645; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89, 94.[6a] Indeed, the existence of such immunity was the basic underlying assumption upon which was constructed the recent opinion in *Alabama* v. *King & Boozer,* 314 U. S. 1. For, in that case, the primary inquiry was whether the legal incidence of the state tax was upon the United States or upon the contractor; if it were upon the United States, it would be invalid, whereas, if it were upon the contractor as held by the Court, it would be valid. The issue is to be sharply distinguished from the familiar question raised in a related group of cases, namely, the extent to which a private person may claim immunity from taxation at the hands of one sovereign by reason

[6a] *Hunt* v. *United States,* 278 U. S. 96; *Ohio* v. *Thomas,* 173 U. S. 276.

of his relationship to the other sovereign. In that situation the tax upon the private person is valid if it is nondiscriminatory. See, e. g., *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *James* v. *Dravo Contracting Co.*, 302 U. S. 134. But where the tax is levied directly upon the United States it is *per se* an interference with the functions that the United States exercises under the Constitution.

In the exercise of its constitutional functions, however, the Government frequently acts through agencies or instrumentalities that have a juristic personality which is separate and distinct from that of the United States itself. The Tennessee Valley Authority and the Reconstruction Finance Corporation are familiar examples. The Government might have undertaken the activities of these agencies in its own name, but by reason of expedience it chose to engage in those activities through corporations which it created and to which it gave an independent existence. Yet plainly the Tennessee Valley Authority and the Reconstruction Finance Corporation are entitled to the same immunity from state taxation or interference that is enjoyed by the United States. No private person has any interest in those agencies, and to the extent that they discharge the constitutional functions of the United States their constitutional status with respect to the states is the same as that of the United States itself.

Nor is that equivalence of status limited to agencies incorporated under Federal law. In *Clallam County* v. *United States*, 263 U. S. 341, this Court held that the United States Spruce Production Corporation, organized under the laws of Washington, was a Federal instrumentality whose property was exempt from state taxation. The United States owned all of the stock, and the corporation had been organized pursuant to general congressional authority in connection with the prosecution of the World War. As Mr. Justice Holmes pointed out, the "formal erection of a new personality was only for the convenience of the United States to carry out its ends" (263 U. S. at 345), and therefore the Spruce Corporation was entitled to the same immunity from state taxation as was enjoyed by the United States itself.

Accordingly, it is important in this case to examine the nature of post exchanges, and to determine whether they similarly are merely an arm of the United States exclusively engaged in carrying on activities on behalf of the Government in such manner as to render them the equivalent of the United States for purposes of freedom from state interference and taxation.[7]

[7] A somewhat analogous, but nevertheless different question is sometimes raised in determining to what extent a concededly private corporation or person may be a Federal "instrumentality" for purposes of immunity from state regulation. For example, although a Government employee is plainly not the equivalent of the United States, he may

2. *The history of the United States Army Post Exchange.*—Since the year 1776 it has been found essential to the welfare, morale, good order, and discipline of the military forces to provide an agency through which they could be supplied with articles of ordinary use, wear, and consumption not furnished by the Government. The Office of Sutler, established by the Articles of War, September 20, 1776, was the first agency of this character and continued until abolished in 1866, when the commissary department of the Army was designated to perform this function. Act of July 28, 1866, c. 299, 14 Stat. 332. By the Resolution

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be an "instrumentality" of the Government within the limits of the duties that he discharges and cannot constitutionally be required to obtain a state license to perform his duties on behalf of the Government. *Johnson* v. *Maryland*, 254 U. S. 51. Similarly, the contractor in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, was an instrumentality of the United States in the limited sense that it was doing the work of the Government. Although the state could tax its gross receipts, we think there is no doubt that an attempt by the state to regulate the project—as by prescribing the type of dam construction—would be invalid. Cf. *Arizona* v. *California*, 283 U. S. 423, 451–452; *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18.

But the problems raised by the foregoing cases should be kept distinct from the question presented herein. In general, they involve the extent to which a Federal function may be subject to state interference when it is performed by a private person or corporation. In the solution of that problem the courts have often used the "instrumentality" terminology. In the instant case, however, the question is rather whether the Post Exchange is by its very nature such an agency of the Government as to partake of the same freedom from state taxation or regulation that is enjoyed by any other branch of the War Department.

of March 30, 1867, 15 Stat. 29, post traders were permitted to conduct trading establishments at military posts. The post traders continued for many years but as the country became more thickly populated and towns came into existence they gradually disappeared. The commissary department of the Army not being able to handle many needful articles, the place of the post trader was taken by canteens organized by the officers and men on their own initiative and with their own money. This was evidently an unsatisfactory situation and by General Orders, No. 10, Adjutant General's Office, February 1, 1889, the establishment of Post Exchanges was authorized. By the Act of January 28, 1893, c. 51, 27 Stat. 426, post traderships were abolished; in 1895 canteens were discontinued. Thereafter Post Exchange regulations were promulgated (G. O. 46, Hdqrs. of the Army, July 25, 1895), and Post Exchanges as known at the present time were established.*

Statutory basis for Army regulations governing the establishment and operation of Post Exchanges may be found in Section 20 of the Act of July 15, 1870, c. 294, 16 Stat. 315, 319, which provides that the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the Army. The further provision of that Act, that such regulations should be approved by Congress, was eliminated a few years

* Much of the foregoing early history is taken from the files of the Office of the Judge Advocate General.

later by the Act of March 1, 1875, c. 115, 18 Stat. 337. That Army regulations have the force and effect of law has been settled by several decisions of this Court. In *United States* v. *Eliason*, 16 Pet. 291, this Court held (p. 302):

> The secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.
> * * *

See also *United States* v. *Freeman*, 3 How. 556, 566–567; *Gratiot* v. *United States*, 4 How. 80, 117–118.

Moreover, Congress has repeatedly taken cognizance of Army Post exchanges in many appropriation measures, and may therefore be treated as having approved their existence. Cf. *Brooks* v. *Dewar*, 313 U. S. 354, 360–361; *Silas Mason Co.* v. *Tax Comm'n*, 302 U. S. 186, 208. Thus, by the Act of March 2, 1903, c. 975, 32 Stat. 927, Congress appropriated under the title "Barracks and Quarters"—

> For continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement rooms, and gymnasium, to be expended in the discretion and

under the direction of the Secretary of War, five hundred thousand dollars * * *. (32 Stat. 938.)

By the Act of April 23, 1904, c. 1485, 33 Stat. 259, under the same language but with the title changed to read "Military Post Exchange" Congress made an appropriation of $500,000. Further appropriations under similar language were made for many years in the Acts set forth in the margin.

Act of March 2, 1905, c. 1307, 33 Stat. 827, 836	$333,500.00
Act of June 12, 1906, c. 3078, 34 Stat. 240, 253	350,000.00
Act of Mar. 2, 1907, c. 2511, 34 Stat. 1158, 1169	397,500.00
Act of May 11, 1908, c. 163, 35 Stat. 106, 119	400,000.00
Act of March 3, 1909, c. 252, 35 Stat. 732, 744	215,500.00
Act of March 23, 1910, c. 115, 36 Stat. 243, 255	70,900.00
Act of March 3, 1911, c. 209, 36 Stat. 1037, 1050	40,000.00
Act of August 24, 1912, c. 391, 37 Stat. 569, 582	40,000.00
Act of March 2, 1913, c. 93, 37 Stat. 704, 715	40,000.00
Act of April 27, 1914, c. 72, 38 Stat. 351, 364	154,391.00
Act of March 4, 1915, c. 143, 38 Stat. 1062, 1076	45,839.85
Act of August 29, 1916, c. 418, 39 Stat. 619, 636–637	48,592.00
Act of May 12, 1917, c. 12, 40 Stat. 40, 56–57	50,000.00
Act of June 15, 1917, c. 29, 40 Stat. 182, 195–196	500,000.00
Act of October 6, 1917, c. 79, 40 Stat. 345, 363	250,000.00
Act of March 28, 1918, c. 28, 40 Stat. 459, 479	550,000.00
Act of July 8, 1918, c. 139, 40 Stat. 821, 830	200,000.00
Act of July 9, 1918, c. 143, 40 Stat. 845, 862	2,904,950.00
Act of November 4, 1918, c. 201, 40 Stat. 1020, 1029	1,880,712.00
Act of July 11, 1919, c. 8, 41 Stat. 104, 118–119	675,000.00
Act of June 5, 1920, c. 240, 41 Stat. 948, 963	500,000.00
Act of June 30, 1921, c. 33, 42 Stat. 68, 83	150,000.00
Act of June 30, 1922, c. 253, 42 Stat. 716, 719	115,000.00
Act of March 2, 1923, c. 178, 42 Stat. 1377, 1380	75,000.00
Act of June 7, 1924, c. 291, 43 Stat. 477, 480	87,800.00
Act of February 12, 1925, c. 225, 43 Stat. 892, 895	87,800.00
Act of April 15, 1926, c. 146, 44 Stat. 254, 256	83,800.00
Act of February 23, 1927, c. 167, 44 Stat. 1106, 1108	82,400.00
Act of March 23, 1928, c. 232, 45 Stat. 326, 329	69,740.00
Act of February 28, 1929, c. 366, 45 Stat. 1349, 1352	72,000.00
Act of July 3, 1930, c. 862, 46 Stat. 1014–1015	162,000.00
Act of July 21, 1932, c. 520, 47 Stat. 709, 718–720	552,000.00

Bearing upon the relation of Congress to the Post Exchanges and particularly pertinent to the handling of detachment funds, it is significant that in 1933 and 1934 Congress required the balances of disbanded organization funds amounting to $298,068, which had been largely derived from Post Exchange activities, to be covered into the Federal Treasury. Act of March 4, 1933, c. 281, 47 Stat. 1571, 1573; Act of June 26, 1934, c. 756, 48 Stat. 1224, 1229.[10]

At the hearings upon the bills to establish a Civilian Conservation Corps before a Senate Committee, the Director of Emergency Conservation Work recommended a provision in the bill authorizing the creation of Civilian Conservation Corps Camp Exchanges "just like the post exchange at Army posts" in order that the Camp Exchange in a Cilivian Conservation Corps Camp would be "on the same basis as the post exchanges on an Army reservation." Senate Hearings before the Committee on Education and Labor, on S. 2102, 75th Cong., 1st Sess., pp. 47–48. In compliance with this request Congress provided for the creation and operation of Civilian Conservation

[10] In this connection, see the statement of Secretary of War Hurley before the Subcommittee of the House Committee on Appropriations. Hearings, House and Senate, War Department Appropriation Act, 1934, 72d Cong., 2d Sess., p. 648.

Corps Camp Exchanges."[11] Section 4, Act of June 28, 1937, c. 383, 50 Stat. 319.

Finally, in enacting the Act of October 9, 1940, we have seen that Congress placed "voluntary unincorporated organizations of Army or Navy personnel" in the same category with Army commissaries and ship's stores as federal instrumentalities."[12]

3. *The nature and functions of United States Army Post Exchanges.* The Army regulations governing Post Exchanges which were in effect at the time this case came on to be heard before the District Court were embodied in AR 210–65, dated June 29, 1929, as modified by various amendments down to March 9, 1940, which were brought

[11] In *United States* v. *Query*, 21 F. Supp. 784, a Civilian Conservation Corps Camp Exchange was held to be a federal instrumentality and therefore constitutionally immune from the taxes imposed by the South Carolina statute involved in the instant case.

[12] Congress had also taken cognizance of army post exchanges in Section 10 of the Hayden-Cartwright Act (Act of June 16, 1936, c. 582, 49 Stat. 1519, 1521), where it expressly permitted state taxation of gasoline and other motor vehicle fuels "sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States." See *Minnesota* v. *Ristine*, decided March 30, 1942, by the Circuit Court of Appeals for the Eighth Circuit.

together in AR 210–65, "C3."[12] The summary which follows is based upon AR 210–65, unless otherwise indicated.

The commanding officer stationed at each Army Post or camp is directed to establish and maintain a Post Exchange whenever—

1. There is need for it.
2. There are organizations present that desire to participate therein.
3. The personnel is sufficient to maintain profitably and support such an exchange (par. 1).

Subject only to superior authority the commanding officer, who is charged with numerous duties relating to the welfare of the troops (par. 6), is vested with complete jurisdiction over the conduct of all Post Exchanges within his command, and is held "strictly responsible" for their efficient operation, and for the enforcement of exchange regulations (par. 2). A Post Exchange officer is detailed by the commanding officer to manage the affairs of each Post Exchange. He receives no compensation for his services other than his regular Army pay (par. 17). Each Post Exchange is governed by a council consisting of the Post Exchange officer and the commanding

[12] These regulations have since been superseded by AR 210-65, dated July 1, 1941, which will be supplied to the Court together with copies of the foregoing regulations. Judicial notice may be taken of these regulations. *Thornton v. United States*, 271 U. S. 414.

officer of each company, battery, hospital detachment or other unit which participates in it (par. 16).

The primary purposes of a Post Exchange are—

1. To supply troops, at the lowest possible prices, with articles of ordinary use, wear and consumption not supplied by the Government.

2. To afford to troops means of rational recreation and amusement.

3. Through Post Exchange profits to provide, when necessary, the means for improving the company messes (par. 4). With respect to profits it is expressly charged that Post Exchanges shall be conducted "in such a manner as to be of real assistance and convenience to the enlisted men rather than as large profit-making institutions" (par. 4).

Post Exchange activities may include: a general store, including a gasoline filling station; a restaurant; a barber shop, laundry, tailor shop, and shoe-repair shop; a gymnasium, including equipment for outdoor athletics; recreation rooms equipped with amusement facilities; a library; and a theater for moving pictures, amateur dramatics and the like (par. 5).

By virtue of appropriations made by Congress over a period of some 30 years (*supra*, p. 37), buildings for the use of Post Exchanges have been supplied at many Posts (par. 46; AR 210–65, *C3, par. 46). At Posts where Post Exchange buildings have not been provided the commanding officer

is required to set apart any suitable building which is available for the use of the Post Exchange. When this cannot be done, the commanding officer may authorize the construction of a temporary building, wholly or in part by the labor of troops, and the Quartermaster Corps is authorized to supply the necessary teams, tools, windows, sashes, doors, and such other material as may be on hand and can be spared (par. 47). The Quartermaster is also authorized to furnish heat and heating and lighting apparatus (par. 59), and to sell to a Post Exchange at cost any ordinary subsistence stores (par. 51). Post Exchanges are permitted the free use of radio, telegraph and cable facilities owned and operated by the War Department (par. 55).

Membership in a Post Exchange is limited to companies, troops, batteries, aero squadrons, and similarly organized units and detachments. There are no individual members (par. 8). These various detachments supply the funds necessary to the fitting up of the quarters and the purchase of the first store of goods. Such funds originate primarily from the liquidation of the interests of the detachments in other Post Exchanges where they have been previously stationed (par. 48). They may also be derived from various detachment activities.[14]

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[14] These detachment funds, as well as the Post Exchange funds, are under the strict control of the Secretary of War. See AR 210–50 and AR 210–50, C 1. And see footnote 15, *infra*, p. 44.

Sales may be made by Post Exchanges only to a specified list of persons, namely, to officers and men of the regular Army, on the active and retired list; army nurses and contract surgeons; members of the Officers' Reserve Corps and Enlisted Reserve Corps while on active duty; officers, warrant officers, and enlisted men of the National Guard when in federal service; civilian employees authorized for service abroad, having a status recognized by the War Department as part of an expeditionary force; and civilians employed or serving at Military Posts (AR 210–65, *C3, par. 7½).

The profits, if any, made by a Post Exchange are distributed as follows: five percent is set aside as a fund which is divided among the detachments which are members of the exchange; a second portion is distributed to the recreation fund of the Post for the laying out of gardens, for the purchase of books, newspapers, periodicals, stationary and similar articles for the library and for the purchase of gymnastic appliances, prizes for athletic sports and kindred items; the balance is then distributed to the member detachments (par. 8 (d); AR 210–65, *C3, par. 8 (e)).[14a] These funds belong

[14a] In addition, it is expressly provided that Post Exchange profits may be used to support entertainments, service clubs and similar activities, which "will be centered, ordinarily, about the post exchange" (par. 6). The importance of such activities for the maintenance of morale, particularly at posts located some distance from large population centers, can scarcely be overestimated.

to no particular individual and even the portion which is set aside for the various organizations having membership in the Post Exchange is held by their officers in trust, subject to the orders of the Secretary of War and congressional enactment.[15]

Although Post Exchanges are required to conduct their transactions in their own names and not to pledge the credit of the Government, the funds of a Post Exchange are entrusted to Army officers "in their official capacity" and their misapplication is punishable under the Articles of War (par. 72). Comprehensive requirements are prescribed as to the keeping of records (Sec. V), the auditing of Post Exchange funds (Sec. VIII), the granting of credit to the personnel. (Sec. VI) and, indeed, with respect to almost every conceivable aspect of the transactions conducted by them.

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[15] As stated by the court in *Dugan* v. *United States*, 34 C. Cls. 458, 468:

> The Government, through its officers, by authority of the regulations, not only establishes and maintains such exchanges, but receives, handles, and disburses the funds in connection therewith, and whatever profit accrues is paid over to and held by the officer in command of such organizations as a company fund.

These funds are similar to the personal property issued to Indians which was considered in *United States* v. *Rickert*, 188 U. S. 432, 443–444, and in *United States* v. *Pearson*, 231 Fed. 270, and to the Naval Academy Laundry Fund considered in *Sullivan* v. *United States*, 92 C. Cls. 154.

The present Post Exchange regulations, effective July 1, 1941 (footnote 13, *supra*, p. 40), were not before the courts below. We think they are nevertheless pertinent as evidencing the continuous supervision exercised by the War Department over Post Exchanges. In particular, it should be noted that paragraph 11 of the present regulations establishes within the War Department a central agency known as the Army Exchange Service which has extensive authority and supervision over Post Exchanges wherever located.

It is clear from the foregoing that a Post Exchange is a mere agency of the War Department. It is operated and controlled by officers of the Army who receive no separate compensation for their services, and whose activities are governed down to the minutest detail by regulations promulgated by order of the Secretary of War. Such profits as may be derived from the operation of a Post Exchange are never paid over to any individual, but are employed in connection with activities directly related to the Army, and particularly in connection with activities regarded as essential to the maintenance of Army morale. Buildings and supplies are often furnished directly by the United States without cost and repeated appropriations have been made by Congress over a long period of years on behalf of Post Exchanges. Although it is true that a Post Exchange has no authority to pledge the credit of the United States

this fact alone cannot detract from its status as an instrumentality of the Government in its most literal sense. Presumably, the United States Spruce Production Corporation in the *Clallam County* case could not pledge the credit of the United States, its liability being limited to its corporate assets;[16] yet it was held entitled to the same immunity from state taxation as is accorded the United States itself.

The application of the same principle is peculiarly appropriate here. The state Act has a direct and impeding impact upon the activities of this unit of the Army. Wholly apart from the financial burden imposed directly upon this instrumentality, the comprehensive provisions of the state Act dealing with licenses, maintenance of records, inspection by state officers, forfeitures, etc. are repugnant to the freedom from state interference with federal activities that the constitution intended to insure. It is respectfully submitted that a United States Army Post Exchange may not constitutionally be subjected to such state legislation.

4. *Rulings and decisions of the lower courts.*— Although the published administrative rulings and the decisions of the lower courts have not been entirely uniform, they on the whole reinforce the

[16] Cf. also *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 567–568; *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 250; *King County, Wash.* v. *United States Ship. Board E. F. Corp.*, 282 Fed. 950 (C. C. A. 9th).

conclusion that a Post Exchange is an instrumentality of the United States in the constitutional sense.

The Judge Advocate General of the Army has repeatedly held that Army Post Exchanges are federal instrumentalities. Ops. J. A. G., September 25, 1923, and December 2, 1919; AR 210–65, Section IX. Since 1902 Post Exchanges have been permitted, with the consent of the Postmaster General, to exercise the franking privilege on all correspondence relating to their business. January 23, 1902, Circular No. 5, Hdqrs. of the Army, Washington; AR 210–65, par. 73. The Comptroller of the Treasury on many occasions has held that, a Post Exchange being a federal instrumentality, the pay of officers and soldiers may be stopped to reimburse a Post Exchange for indebtedness incurred by them. Several of these decisions are collected in AR 210–65, par. 74. On the same ground, the Bureau of Internal Revenue has ruled that Post Exchanges are exempt from the payment of a variety of federal taxes. S. T. 620, XII–I Cum. Bull. 419 (1933). By letter dated February 16, 1940, the Acting Commissioner of Internal Revenue expressed the opinion (S. S. T. 385, 1940–1 Cum. Bull. 202)—

> that Army post exchanges are instrumentalities of the United States [and] * * * that they are wholly owned by the United States within the meaning of sections 1426 (b) (6) and 1607 (c) (6) of the Internal

> Revenue Code,' as amended. Accordingly post exchanges and their employees are exempt from the payment of the [social security] taxes imposed by subchapters A and C of Chapter 9 of the Code as amended.

On February 5, 1934, the Attorney General of the United States rendered an opinion holding that Post Exchanges of the Army, Navy, and Marine Corps were federal instrumentalities and were therefore entitled to exemption from the payment of license fees on motor vehicles owned by them in the Panama Canal Zone. 37 Op. Atty. Gen. 435. Following this opinion, Executive Order No. 6589, dated February 6, 1934, was issued by the President expressly exempting from the license tax in the Canal Zone vehicles owned and operated—

> by the United States Government and by legally authorized instrumentalities thereof, such as post exchanges, company and recreational organizations of the Army and Marine Corps, and ship's service activities of the Navy; the Panama Railroad Co.; * * *.

The Panama Railroad Company, last referred to above, was held by this Court to be an instrumentality of the United States in *N. Y. ex rel. Rogers* v. *Graves,* 299 U. S. 401. See also 39 Op. Atty. Gen. 316, 319.

The Court of Claims has twice held that a United States Army Post Exchange is an instrumentality of the Federal Government engaged in the performance of governmental functions. In *Dugan* v. *United States,* 34 C. Cls. 458, it was held on this

ground that a Post Exchange was not subject to the federal taxes imposed upon retail liquor dealers. In *Woog, Admr.* v. *United States,* 48 C. Cls. 80, it was held that the failure of a Post Exchange officer properly to account for Post Exchange funds coming into his hands was of such concern to the Government as to justify a deduction from his Army pay. And in *Falls City Brewing Co.* v. *Reeves,* 40 F. Supp. 35 (W. D. Ky.), the court held that a Post Exchange is a federal instrumentality within the meaning of the Act of October 9, 1940.

There are several decisions, however, which seem to point the other way. *Pan American Petroleum Corp.* v. *Alabama,* 67 F. (2d) 590 (C. C. A. 5th), certiorari denied, 291 U. S. 670; *People* v. *Standard Oil Co.,* 218 Cal. 123, reversed on other grounds, 291 U. S. 242; *Thirty-First Infantry Post Exchange* v. *Posadas,* 54 Phil. 866, certiorari denied, 283 U. S. 839.[17] But even these cases are distinguishable. In neither the *Pan American Petroleum Corp.* case nor the *Standard Oil* case was the tax in question levied upon the Post Exchange, and in neither was the Post Exchange represented as a party in the litigation. Unlike the instant case, the legal incidence of the taxes there involved fell upon a private dealer who transacted business with the Post Exchange. The same was likewise true

[17] See also *Keane* v. *United States,* 272 Fed. 577 (C. C. A. 4th), which is not only distinguishable (cf. *Pierce* v. *United States,* 314 U. S. 306), but which must be regarded as overruled by the court below in the instant case to the extent that it expresses a contrary view.

in the *Posadas* case, which is further distinguishable upon the ground that the tax in question was levied by the Philippine Islands and Congress had not exercised its recognized prerogative of overruling the Philippine legislation, 54 Phil. 866, 872.

CONCLUSION

The United States Army Post Exchanges within the external boundaries of South Carolina are constitutionally immune from the state taxing Act and its auxiliary regulatory provisions, whether or not they are located upon an exclusively federal area. The judgment below should be affirmed, unless the Court is of the view that the appeal to the court below was improper under Section 266 of the Judicial Code, in which event the cause should be remanded with directions to dismiss the appeal to that court or with such other directions of a remedial character as this Court may choose to give.

Respectfully submitted.

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MAY 1942.

APPENDIX

Code of Laws of South Carolina (1932), Vol. II (Act No. 574, Acts of 1928 of the General Assembly, as amended):

§ 2527. [As amended by Act No. 337, Acts of 1937 of the General Assembly] *Business License Tax.*—(1) *Persons, Firms and Corporations Liable.*—Every person, firm or corporation doing business within the State of South Carolina and engaging in the business of selling such articles or commodities as are named in this section, for the privilege of carrying on such business shall be subject to the payment of license tax which shall be measured by and graduated in accordance with the volume of sales of such person, firm or corporation within the State: *Provided,* That every person, firm, corporation, club or association who sells and/or stores and/or receives for the purpose of distribution to any person, firm or corporation, club, association, any shotgun or other shells or cartridges and/or manufactured tobacco products, and/or playing cards otherwise taxable under the provisions of sections 2521 to 2554 shall pay the tax at the rates herein provided for the sale of such articles.

(2) *Licenses Required.*—Every person, firm or corporation engaged in the business of purchasing, selling or distributing within this State, cigars, cheroots, stogies, cigarettes, snuffs, smoking or chewing tobacco, either or all, shall within thirty (30) days after the approval of sections 2521 to 2554

file with the South Carolina Tax Commission an application for a license permitting them to engage in such business. The application for licenses shall be filed on blanks to be furnished by the South Carolina Tax Commission for that purpose and shall contain a statement including the name of the individual, the name of the partnership and of each individual partner, or corporation, the post office address and the nature of business, whether wholesale or retail, in which engaged. In case any business is conducted at two or more separate places, a separate license for each place of business shall be required: *Provided,* That any person, firm or corporation hereafter intending to engage in the business of buying, selling, or distributing cigars, cheroots, stogies, cigarettes, snuffs, smoking or chewing tobacco, shall, precedent to engaging in such business, file an application for a license in the manner and form hereinabove required. Upon receipt of an application for a license to engage in the business above set forth the South Carolina Tax Commission shall issue to such applicant a license permitting the purchase, sale and distribution of the articles referred to in this section. Such license shall be displayed at all times in some conspicuous place at or in his or its place of business easily seen by the public. Nothing herein shall be construed as requiring a license for the privilege of buying, selling or distributing leaf tobaccos: *Provided, further,* That the Tax Commission may reclassify a person, firm or corporation as a wholesaler or retailer as may be just and proper according to the business done: *Provided, further,* That every retail dealer when filing application for license shall state

the kind and nature of business engaged in, whether drugs, grocery, hardware, general merchandise, etc.

(3) *License May Be Revoked or Restored.*—In addition to the penalties imposed in §§ 2521 to 2554 and after conviction for a second offense by a court of competent jurisdiction for any violation of the provisions of sections 2521 to 2554, the South Carolina Tax Commission may revoke any license which may have been issued to the party or parties adjudged guilty by the court, and upon good cause shown by party whose license has been revoked, may issue a new license when, in its discretion, such applicant conforms to the provisions of said sections. No license issued permitting the sale and distribution of tobacco products shall be transferable, and any license issued to any individual, firm or corporation who shall afterwards retire from business, shall be null and void: *Provided,* That anyone may be allowed to operate for ten (10) days after purchase of stock in bulk, pending granting of license, upon application made promptly upon such purchase.

(4) *Penalties for Operating Without License.*—Any person, firm or corporation engaging in the business of buying, selling, or distributing within this State, cigars, cheroots, stogies, cigarettes, snuff, smoking tobacco, chewing tobacco, without having secured the required license from the South Carolina Tax Commission shall be guilty of a misdemeanor, and, upon conviction by a court of competent jurisdiction, shall be fined not less than twenty ($20.00) dollars, nor more than one hundred ($100.00) dollars, or imprisoned not more than thirty (30) days for each and every offense: *Pro-*

vided, however, That the provisions set forth above shall not apply to churches, schools and charitable organizations operating booths at state, county, and community fairs: *Provided, further,* That the provisions above set forth shall not apply to school or church entertainments.

(5) There shall be levied, assessed, collected and paid in respect to the articles containing tobacco enumerated in this section, the following amounts:

(a) *Little Cigars.*—Upon cigars of all descriptions made of tobacco, or any substitute therefor, and weighing not more than three (3) pounds per thousand, one ($0.01) cent for each ten (10) cigars, or fraction thereof.

(b) *Cheroots, Stogies, Etc.* [as amended by Act No. 1356, Acts of 1938 of the General Assembly]—Upon cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three (3) pounds per thousand, retailing for three and one-third (0.03-⅓) cents each, or less, Three ($3.00) Dollars per thousand.

(c) *Cigars.* [as amended by Act No. 1356, Acts of 1938 of the General Assembly]—Upon cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three (3) pounds per thousand, retailing for over three and one-third (0.03-⅓) cents each, Ten ($10.00) Dollars per thousand.

For the purpose of computing the tax, cheroots, stogies, etc., are hereby classed as cigars.

(d) *Cigarettes.*—Upon all cigarettes made of tobacco or any substitute therefor: upon each package retailing for five ($0.05) cents, or less, one ($0.01) cent; upon each

package retailing for more than five ($0.05) cents each an additional one ($0.01) cent for each five ($0.05) cents, or fractional part thereof of the retail selling price in excess of five ($0.05) cents;

(e) *Snuff and Chewing Tobacco.*—Upon snuff and chewing tobacco, one ($0.01) cent for each three ounces or fractional part thereof;

(f) *Smoking Tobacco.*—Upon all smoking tobacco, including granulated, plug cut, crimp cut, ready rubbed and other kinds and forms of tobacco prepared in such manner as to be suitable for smoking in a pipe or cigarette: upon each package retailing for five ($0.05) cents or less, one ($0.01) cent; upon each package retailing for more than five ($0.05) cents each an additional one ($0.01) cent for each five cents or fractional part thereof of the retail selling price in excess of five ($0.05) cents;

(g) *Cartridges and Shells.* [as amended by Act No. 254, Acts of 1935 of the General Assembly]—Upon all shot gun or other shells, two ($2.00) dollars per thousand rounds;

Upon all cartridges, twenty-three (23) caliber or greater, two ($2.00) dollars per thousand rounds;

(h) *Candy.* [Repealed by Act No. 337, Acts of 1937 of the General Assembly.]

(i) *Playing cards.*—Upon all playing cards a tax of five ($0.05) cents on each fifty ($0.50) cents or fractional part thereof of the retail selling price, the stamps in all such cases to be affixed to the individual package.

* * * * *

(7) *Method and Time of Affixing Stamps.* [as amended by Act No. 178, Acts of 1935 of

the General Assembly]—The license taxes imposed by this section shall be paid by affixing stamps in the manner and at the time herein set forth. In the case of cigars, stogies, cheroots, and chewing tobacco, the stamps shall be affixed to the box, or container, in which or from which normally sold at retail: *Provided,* That wholesalers and jobbers shall affix the required stamps within seventy-two (72) hours after such tobacco products are received by them: *Provided, further,* That any retailer shall have twenty-four (24) hours within which to affix the stamps after such tobacco products are received by him, or them: *Provided, however,* In the event such tobacco products are manufactured within the State of South Carolina and sold to consumers, such products shall be stamped by the manufacturers when and as sold, but where such tobacco products are sold to *bona fide* wholesale and retail merchants, such products shall be stamped by wholesale and retail merchants within the time required in this section: *Provided, however,* The Tax Commission may, in its discretion, where it is practicable and reasonable for the enforcement of the collection of taxes provided hereunder, promulgate such rules and regulations as to permit cigars, stogies and cheroots to remain unstamped in the hands of wholesalers and jobbers until the original case or crate is broken, unpacked, or sold.

In the case of cigarettes, snuff, smoking tobacco, chewing tobacco wrapped in packages of two (2) pounds or less, shotgun or other shells, cartridges, playing cards, and candy retailing for eighty (80c) cents per pound or above, the stamps shall be affixed to each individual package by wholesalers

and jobbers within seventy-two (72) hours after such products are received by them and by any retailer within twenty-four (24) hours of receipt by him or them of any such products: *Provided,* That such goods must be stamped before being sold: *Provided, further,* In the event any manufactured tobacco products, shells, cartridges, playing cards, or candy retailing for eighty (80c) cents per pound or above, are manufactured within the State of South Carolina, they shall be stamped by the manufacturer when and as sold: *Provided, however,* That all retail dealers in manufactured tobacco products, shells, cartridges, playing cards, or candy retailing for eighty (80c) cents per pound or above, purchasing or receiving such commodities from without the State, whether the same shall have been ordered through a wholesaler or jobber in this State and/or by drop shipment and/or otherwise, shall within five days after receipt of the same mail a duplicate invoice of all such purchases or receipts to the South Carolina Tax Commission. Failure to furnish duplicate invoices as required shall be deemed a misdemeanor; and, upon conviction, be punishable, by a fine of not more than One Hundred ($100.00) Dollars for each offense, or imprisonment for a period not exceeding thirty (30) days.

It is the intent and purpose of this section to require all manufacturers within this State, wholesale dealers, jobbers, distributors and retail dealers, to affix the stamps provided for in this section to taxable commodities, but when the stamps have been affixed as required herein, no further or other stamp shall be required under the provisions of Sections 2521 to 2554 regardless

of how often such articles may be sold or resold within this State.

(8) *Commodities subject to Confiscation.*—Any cigarettes, snuff, smoking tobacco or chewing tobacco; cigars, stogies, cheroots, cartridges, shells, candy retailing at eighty (80) cents per pound, and above, and playing cards, found at any point within the State of South Carolina, which said cigarettes, snuff, smoking tobacco or chewing tobacco, cigars, stogies, cheroots, cartridges, shells, candy retailing at eighty (80) cents per pound, and above, playing cards shall have been within the State of South Carolina for a period of twenty-four (24) hours, or longer, in possession of any retailer or for a period of seventy-two (72) hours or longer, in possession of any wholesaler or jobber not having affixed to the package as above defined the stamps, as above provided, are hereby declared to be contraband goods and the same may be seized by the South Carolina Tax Commission, or its employees, and/or by any peace officer of the State of South Carolina, without a warrant and the said goods shall be delivered to the Tax Commission for sale at public auction to the highest bidder after due advertisement, but the South Carolina Tax Commission before delivering any of said goods so seized shall require the purchaser to affix the proper amount of stamps to the individual packages as above defined. The proceeds of sale for any goods sold hereunder shall be turned over to the State Treasurer by the South Carolina Tax Commission as other funds collected by said Commission: *Provided*, That the cost of confiscation and sale shall be paid out of the proceeds derived from such sale before making remittance to

the State Treasurer: *Provided, further,* That the time limits of twenty-four (24) hours or seventy-two (72) hours for affixing said stamps shall not apply to any person, who, within said time limits shall offer for sale, either at wholesale or retail, any of the goods, wares or merchandise herein enumerated and all such goods, wares or merchandise when offered for sale, either at wholesale or retail without the stamps having been first affixed, shall be subject to confiscation as hereinabove provided: *Provided, further,* That any vehicle, not a common carrier, which may be used for the transportation for the purpose of sale of unstamped articles as hereinabove enumerated shall likewise be subject to confiscation and sale in the same manner as above provided for unstamped goods, wares or merchandise.

(9) *Procedure When Goods Are Confiscated.*—In all cases of seizure of any goods, wares, merchandise, or other property hereafter made as being subject to forfeiture under provisions of sections 2521 to 2554 which in the opinion of the officer, or person making the seizure, are of the appraised value of twenty-five ($25.00) dollars, or more, the said officer or person, shall proceed as follows:

* * * * *

Third. Any person, claiming the said goods, wares or merchandise, or other property, so seized as contraband within the time specified in the notice may file with the South Carolina Tax Commission a claim in writing, stating his interests in the articles seized, and may execute a bond to the South Carolina Tax Commission in a penal sum equal to double the value of said goods so seized, but in no case shall said bond be

less than the sum of one hundred ($100.00) dollars, with sureties to be approved by the clerk of court in the county in which the goods are seized, conditioned that in the case of condemnation of the articles so seized, the obligors shall pay to the South Carolina Tax Commission the full value of the goods so seized and all costs and expenses of the proceedings to obtain such condemnation, including a reasonable attorney's fee. And upon the delivery of such bond to the South Carolina Tax Commission it shall transmit the same with the duplicate list or description of the goods seized to the solicitor of the circuit in which such seizure was made, and the said solicitor shall prosecute the case to secure the forfeiture of said goods, wares, merchandise, or other property, in the court having jurisdiction. Upon the filing of the bond aforesaid the said goods shall be delivered to the claimant pending the outcome of said case.

* * * * *

(11) *Promulgation of Rules and Regulations.*—The South Carolina Tax Commission may promulgate rules and regulations governing the stamping of any articles or commodities enumerated herein handled by persons, firms or corporations operating on inter-state common carriers.

(12) *Cancellation of Stamps on Chewing Tobacco and Cigars—Violation.*—Whenever an adhesive stamp is used for denoting any tax imposed by this section on chewing tobacco packed in packages of two pounds, or more, or upon cigars packed in boxes of twenty (20) cigars, or more, as heretofore provided, the person using or affixing the same shall cancel said stamps with a rubber stamp bearing his or its firm name, a part

of said rubber stamp to be placed on the revenue stamp and a part on the package, so that said stamp may not again be used. That whoever makes use of any adhesive stamp to denote the payment of any tax on chewing tobacco and cigars as outlined above without canceling the stamps as above provided, shall be subject to a penalty of not exceeding one hundred ($100.00) dollars to be assessed and collected by the South Carolina Tax Commission as other penalties are collected.

§ 2528. *Sale of Stamps—Regulations for Enforcement—Penalties for Evading, Etc.*—(1) *Interfering with Inspections.*—It shall be provided by regulations of the Tax Commission the methods of breaking packages, forms and kinds of containers and methods of affixing stamps that shall be employed by persons, firms or corporations subject to the tax imposed by sections 2521 to 2554 which will make possible the enforcement of payment by inspection and any person, firm or corporation subject to this tax, engaging in or permitting such practices as are prohibited by regulations of the Tax Commission, or in any other practice which makes it difficult to enforce the provisions of said sections by inspection or if any person, firm or corporation, agent or officer thereof, who shall upon demand of any officer or agent of the South Carolina Tax Commission, refuse to allow full inspection of the premises or any part thereof or who shall hinder or in anywise delay or prevent such inspection when demand is made therefor, shall be deemed to be guilty of a misdemeanor, and shall, upon a conviction, be fined not more than two hundred ($200.00) dollars for each offense, or imprisonment

for a period not exceeding sixty (60) days, or both, in the discretion of the court.

* * * * *

(4) *Penalties for Evading Stamp Tax—Trial by Jury if Desired.*—Persons failing to properly affix the required stamps to any cigars, cheroots, stogies, cigarettes, snuff, smoking tobacco, chewing tobacco, candy, playing cards, ammunition, shall be required to pay as part of the tax imposed hereunder, a penalty of not less than twenty ($20.00) dollars nor more than one hundred ($100.00) dollars, to be assessed and collected by the South Carolina Tax Commission as other taxes are collected. And each article or commodity not having proper stamps affixed thereto as herein required shall be deemed a separate offense: *Provided,* That any cigars, cheroots, stogies, cigarettes, snuff, smoking tobacco, chewing tobacco, candy, playing cards or ammunition, in the place of business of any person required by the provisions of sections 2521 to 2554 to stamp the same shall be *prima facie* evidence that they are intended for sale: *Provided, further,* That if within ten (10) days, and not thereafter, after notification in writing, by the South Carolina Tax Commission, or its duly authorized agent, to the person or corporation of its failure to properly affix the required stamps to any article or commodity, or within ten (10) days after written notification to him that he has sold any article or commodity requiring stamps without having the stamps properly attached thereto as required by said sections, the party charged, or to be charged, with such omission as herein provided shall have the right within said time, and not thereafter, to demand a trial of the issue before a

court of competent jurisdiction in the manner now provided by law for the trial of civil actions or civil suits. The written notice herein required may be served by mail. When it is so served the paper must be deposited in the post office addressed to the person on whom it is to be served at his last known place of residence, and the postage paid, and the ten days' time herein provided shall begin to run from the date of mailing. Said notice may also be personally served by any agent of the South Carolina Tax Commission or any other person, by delivering the same to the person or corporation charged, or by leaving the same in the place of business of such person or corporation: *Provided, further,* That the South Carolina Tax Commission, upon good cause shown may, in their discretion, remit the penalty, or any part thereof, prescribed last above herein: *Provided, further,* That any judgment rendered in favor of the South Carolina Tax Commission in any civil action or suit shall be a first preferred lien for taxes upon all property of the taxpayer and in the event of nonpayment shall be filed in the office of the clerk of court in the county where taken and execution may be issued by the Tax Commission as now provided by law. But the lien provided for in this section shall not have priority over any *bona fide* lien recorded before the judgment is taken on any property belonging to the taxpayer other than that directly pertaining to and used in the conduct of the business in which such penalty was incurred.

* * * * *

§ 2529. *Powers of Tax Commission.*—The South Carolina Tax Commission shall administer and enforce the taxes imposed by

sections 2521 to 2554. It shall have the power to enter upon the premises of any taxpayer and to examine, or cause to be examined, by any agent or representative, designated by it for that purpose, any books, papers, records, or memoranda, etc., bearing upon the amount of taxes payable, and to secure other information directly or indirectly concerned in the enforcement of said sections.

§ 2530. *Execution Issued for Unpaid Taxes or Penalties.*—If any taxes or penalties imposed by sections 2521 to 2554 remain due and unpaid for a period of ten (10) days, the Tax Commission shall issue a warrant of execution, directed to the sheriff of the county of the State commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with penalties, if any, * * *

* * * * *

§ 2532. *Soft Drink Tax.*—Every person, firm or corporation doing domestic or intrastate business within this State and engaging in the business of selling, manufacturing, purchasing, consigning, using, shipping, or distributing, for the purpose of sale within this State, any of the following articles, or things, viz.: soda water, ginger ale, coca-cola, lime-cola, pepsi-cola, near beer, beer, fruit juices, bottled drinks of every kind whatsoever, and all fountain drinks and other beverages and things commonly designated as "soft drinks," for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the sales of such person, firm or corporation within the State

of South Carolina except as may hereinafter be provided, as follows:

* * * * *

(b) *Bottled Drinks.*—Any and all soft drinks offered for sale in sealed bottles shall, within twenty-four (24) hours of the time of its manufacture, or receipt in this State, be stamped with South Carolina Soft Drinks License Tax Stamps at the rate of one ($0.01) cent for each five ($0.05) cents or fractional part thereof of the retail selling price, by affixing said stamps at said rate to each individual bottle. That in the case of bottled drinks shipped into South Carolina from a point outside of said State, said stamps shall be affixed to said bottled drinks within twenty-four (24) hours after such bottled drinks come into possession of the person first receiving the same, whether said person be a wholesaler, jobber, distributor, and/or retailer of said products.

Bottle Drinks Taxable.—Bottled soft drinks as referred to in sections 2521 to 2554, shall include any and all beverages whether carbonated or not, such as soda water, ginger ale, nugrape, coca-cola, lime-cola, pepsi-cola, budwine, beer, near beer, fruit juice, milk drinks, when any flavoring or syrup is added, cider, cordial, bottled carbonated water and/or any and all bottled preparations commonly referred to as soft drinks of whatsoever kind and description.

(c) * * *

Stamps or Crowns Required.—It is the intent and purpose of this section to require all manufacturers and dealers in bottled soft drinks to affix either soft drinks license tax stamps or soft drinks license tax crowns to each individual bottle of soft drinks sold or distributed, and when the said stamps or

crowns are so affixed they shall be evidence of the payment of the tax provided herein. But when the stamp or crown has been affixed as herein required, no further or other stamp or crown shall be required under the provisions of sections 2521 to 2554, regardless of how often such bottled drinks are sold or resold within this State. That in the event the manufacturers of bottle drinks either within or without the State of South Carolina shall use the soft drinks license tax crown as herein provided for; then and in such event, said manufacturer shall be relieved of the duty of stamping each individual bottle.

(d) *Tax Commission To Distribute Crowns—Price of Crowns.*—The South Carolina Tax Commission is hereby authorized, empowered and directed to promulgate rules and regulations governing the purchase, sale, and distribution of crowns, with which to seal said bottled soft drinks within this State. Said crowns shall carry a design approved by the South Carolina Tax Commission, the use of which crown shall be evidence of the payment of the license taxes provided in sections 2521 to 2554. Manufacturers and/or distributors of crowns may be required to furnish bond to insure faithful compliance with such regulations, secure license, and meet with all requirements as set forth by the Tax Commission. All purchasers of crowns, whether they be bottlers or otherwise, shall be required to purchase crowns in accordance with rules and regulations promulgated by the South Carolina Tax Commission. The price to be paid by purchasers for crowns shall be the manufacturers' price plus all transportation charges to consignee at destination, and in

addition thereto shall be one ($0.01) cent per crown, when to be used upon bottled drinks retailing for five ($0.05) cents each, or less; two ($0.02) cents per crown when to be used upon bottled drinks retailing for more than five ($0.05) cents each but not more than ten ($0.10) cents each; three ($0.03) cents per crown when to be used upon bottled drinks retailing for more than ten ($0.10) cents each but not more than fifteen ($0.15) cents each, etc., so that the tax will equal one ($0.01) cent for each five ($0.05) cents or fractional part thereof of the retail selling price as the soft drinks license tax herein requires.

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§ 2533. *Tax Levied on Drinks Not Made with Syrup—Method of Collection.*—There shall be levied, assessed and collected a license tax of one ($0.01) cent for each five ($0.05) cents or fractional part thereof, of the retail selling price upon all soft drinks manufactured or sold within this State, which drinks are manufactured without the use of any syrup on which the tax has been previously paid. Such tax to be collected in accordance with rules and regulations promulgated by the South Carolina Tax Commission: *Provided,* That when it is impractical to use stamps and crowns, the South Carolina Tax Commission may dispense with the use of stamps or crowns and may require the seller of soft drinks to make a return in such form and manner as the Tax Commission may require and pay the tax thereon immediately, or the Tax Commission may in its discretion extend the time of payment of the tax provided in this subsection.

§ 2534. *Enforcement by Inspection—Penalties for Interfering with Inspection.*—It shall be provided by regulations of the Tax Commission, the methods of breaking packages, forms and kinds of containers and methods of affixing stamps, that shall be employed by individuals, firms or corporations subject to the tax imposed by sections 2521 to 2554, which will make possible enforcement of payment by inspection; and any individual, firm or corporation subject to this tax, engaging in or permitting such practices as are prohibited by regulations of the Tax Commission, or in any other practice which make it difficult to enforce the provisions of sections 2521 to 2554 by inspection, shall be deemed guilty of a misdemeanor; and, upon conviction be fined not less than twenty ($20.00) dollars or more than one hundred ($100.00) dollars, or imprisoned for a period of not less than ten (10) days or more than thirty (30) days, for each offense in the discretion of the court.

* * * * *

§ 2537. *Penalty for Evasion.*—(1) Any person, firm or corporation required by sections 2521 to 2554 to affix the stamps, or crowns as provided, who shall fail to properly affix the stamps, or crowns, within the time prescribed by law, shall, in addition to the goods being subject to confiscation, be required to pay as a part of the tax imposed hereunder a penalty of not less than twenty ($20.00) dollars, or more than one hundred ($100.00) dollars, to be assessed and collected by the South Carolina Tax Commission, as other taxes are collected. Each article or container not having the proper stamps, or crowns, affixed thereto as herein required, shall be deemed a separate of-

fense: *Provided,* That any soft drink or syrups in the place of business of any person, firm or corporation required by the provisions of this article to stamp the same, shall be *prima facie* evidence that such articles are intended for sale.

* * * * * *

§ 2538. *Commodities Subject to Confiscation.*—(1) *What Commodities May Be Confiscated.*—Any syrups in possession of retail dealers of soft drinks to be used in the making, mixing or compounding of all soft drinks at soda fountains, the containers of which shall not be stamped as herein required, and any and all bottled drinks as hereinabove defined, which shall not be stamped or which shall not have the Soft Drinks License Tax Crowns, showing tax paid attached, which article shall have been manufactured or which shall have been within this State for a period of twenty-four (24) hours, or longer, in possession of any manufacturer, wholesaler, distributor, jobber or retailer, or which shall have been sold within this State, are hereby declared to be contraband goods, and the same may be seized by the South Carolina Tax Commission, its employees, and or by any peace officer of the State of South Carolina, without a warrant, and the said goods shall be delivered to the South Carolina Tax Commission for sale at public auction, to the highest bidder, after due advertisement, but the South Carolina Tax Commission, before delivering any of said goods so seized, shall require the purchaser to affix the proper amount of stamps to the individual packages as above defined. The proceeds of sale for any goods sold hereunder shall be turned over to the State Treasurer by the South

Carolina Tax Commission, as other funds collected by said Commission: *Provided,* That the cost of confiscation and sale shall be paid out of the proceeds derived from such sale before making remittance to State Treasurer: *Provided, further,* That the period of twenty-four (24) hours allowed for affixing said stamps or crowns, shall not apply to any person, firm or corporation who, within said time limit, shall offer for sale, either at wholesale or retail, any of the goods, wares or merchandise herein enumerated, and all such goods, wares and merchandise when offered for sale, either at wholesale or retail without the stamps or crowns having been first affixed, shall be subject to confiscation, as hereinabove provided: *Provided, however,* That any vehicle, not a common carrier, which may be used in transporting, for the purpose of sale, any unstamped articles as hereinabove enumerated, shall likewise be subject to confiscation and sale in the same manner as above provided for unstamped goods, wares or merchandise.

* * * * *

§ 2539. *Record Required of Ingredients Received.*—

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(4) *Record Required of Gross Receipts—Penalty for Failure to Keep Record.*—Every such person, firm or corporation shall keep a record, or records, showing the value and the gross receipts derived from engaging in any business taxable under sections 2521 to 2554, as shall be required by the South Carolina Tax Commission, and such record shall, at all times, be subject to inspection by any agent of the South Carolina Tax Commis-

sion. If any person, firm or corporation required under the provisions of said sections to keep any records, books or papers, shall fail to keep such true and correct records, books or papers, either or all, or shall fail or refuse to submit the same for the inspection of the South Carolina Tax Commission or its duly authorized agent, or shall wilfully make a false or fraudulent return, then and in each event, such person, firm or corporation, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not less than fifty ($50.00) dollars, nor more than two hundred ($200.00) dollars, or imprisonment of not less than thirty (30) days or more than twelve (12) months, or both, in the discretion of the court.

§ 2540. *Execution Issued for Unpaid Taxes.*—If any taxes or penalties imposed by said sections remain due and unpaid for a period of ten (10) days, the Tax Commission shall issue a warrant of execution, directed to the sheriff of the county of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county, for the payment of the amount thereof, with penalties, if any,

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§ 2542. *Amount of Soft Drink Tax and Persons Subject to Payment.*—(1) Every person, firm or corporation doing domestic or intrastate business within this State and engaged in the business of selling, manufacturing, purchasing, consigning, using, shipping or distributing, for the purpose of sale within this State, any of the following articles or things, viz.: soda water, ginger ale, coca-cola, lime-cola, pepsi-cola, near beer, fruit juices, ices, sundaes, confections, bot-

tled drinks of every kind whatsoever and all fountain drinks and other beverages and things commonly designated as "soft drinks", for the privilege of carrying on such business shall be subject to the payment of a license tax, which shall be measured by and graduated in accordance with the sales of such person, firm or corporation within the State of South Carolina, except as may hereinafter be provided, as follows:

(a) On all articles and things last above mentioned and on all other confections and drinks sold, a license tax of twenty (20) per centum of the entire receipts: *Provided,* That the receipts from the sale of bottled drinks upon which the tax herein provided has already been paid by a bottler, or dealer within this State, shall not be included in the entire receipts for purposes of computing the tax herein levied.

(b) On all bottled drinks, one ($0.01) cent for each five ($0.05) cents or fractional part thereof of the retail selling price of the bottle drinks manufactured:

* * * * *

If any taxes or penalties imposed by this section shall remain due and unpaid for a period of thirty (30) days, the person, firm, or corporation responsible for the payment of such taxes and penalties, either or both, shall as a condition for the privilege of further carrying on the business of selling any of the soft drinks enumerated or referred to herein, be required to furnish a good and sufficient bond to be executed by a surety company authorized to do business in South Carolina, and payable to the South Carolina Tax Commission, for and on behalf of the State of South Carolina, and in sufficient amount to insure the payment of all future

taxes, the amount of which bond is to be determined by the South Carolina Tax Commission. Said bond shall be conditioned for the payment of all taxes and penalties that may be lawfully assessed against such taxpayer and shall continue in force so long as such taxpayer shall operate such business. And in case such taxpayer shall operate more than one place of business the bond shall be given in sufficient amount to insure the payment of future taxes for the privilege of carrying on such business. If any person, firm or corporation shall within thirty (30) days from the date of assessment fail to pay any of its taxes and penalties that may be lawfully assessed against him, or it, under the provisions of this section, or shall fail to give bond, or additional bond, as herein provided to secure payment of future taxes and penalties, and shall thereafter carry on the business of selling any of the soft drinks enumerated or referred to in this section, within this State, or without having paid said taxes, or without having furnished the bond hereinabove required, shall be guilty of a misdemeanor, and, upon conviction, shall pay a fine of not less than twenty ($20.00) dollars, or more than two hundred ($200.00) dollars, or be imprisoned for not less than ten (10) days nor more than sixty (60) days, and each day that such business is carried on in violation of the provisions of this section shall constitute a separate offense.

(3) It is hereby declared to be the intent and purpose of this section to impose the taxes herein provided in the case of bottled drinks upon the person, firm, or corporation making first sale within this State, and in all other cases upon the person, firm, or cor-

poration making sale or disposition of all other articles to the final consumer: *Provided,* That in case of bottlers whose output is contained in bottles to be retailed at fifteen (15) cents, or above, and which is sold through jobbers, such bottlers may file with the South Carolina Tax Commission at the end of each month, or at such times as may be prescribed by the Tax Commission, a verified statement showing the quantities of bottled drinks sold and delivered to all jobbers within this State and thereupon the tax shall be collected from such jobber.

(4) Every person, firm, or corporation engaged in the manufacture or sale or distribution of soft drinks are hereby required to keep an accurate account of all daily sales, sales slips, bills, invoices, delivery slips, statements, bills of lading, freight bills, credit memoranda, etc., for a period of not less than eighteen (18) months from the date shown thereon. All such records shall at any time be open to inspection by duly authorized agents of the South Carolina Tax Commission.

Every such person, firm or corporation shall keep a record, or records, showing the value and the gross receipts derived from engaging in any business taxable under this section, and such record shall, at all times, be subject to inspection by any agent of the South Carolina Tax Commission: *Provided,* That in case of any person, firm or corporation engaging in a temporary, transient or itinerant business which is taxable under the provisions of §§ 2521 to 2554 the entire tax shall be paid upon demand by the South Carolina Tax Commission, or any duly authorized agent thereof, and in case the tax is not paid upon demand, all penalties pro-

vided for by said sections shall immediately apply. If any person, firm or corporation required under the provisions of this section to keep any record, book or papers, shall fail to keep such true and correct records, books, or papers, either or all, or shall fail or refuse to submit the same for the inspection of the South Carolina Tax Commission or its duly authorized agents, shall wilfully make a false or fraudulent return, then and in each such event such person, firm or corporation shall be guilty of a misdemeanor, and upon conviction, shall be subject to a fine of not less than fifty ($50.00) dollars nor more than two thousand ($2,000.00) dollars, or imprisonment of not less than thirty (30) days nor more than twelve (12) months, or both, in the discretion of the court: *Provided,* That the license tax herein provided shall not apply in case any bottled drinks are sold to the United States Government for army, navy or marine purposes, and, which shall be shipped from a point within the State to place which has been lawfully ceded to the United States Government for navy, army or marine purposes.

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§ 2546. *Powers of Tax Commission and Administration.*—The administration of sections 2521 to 2554 is vested in the South Carolina Tax Commission, which shall prescribe rules and regulations pertinent to the enforcement of said sections. It shall have power to enter upon the premises of any taxpayer and examine, or cause to be examined by any agent or representative, designated by it for that purpose, any books, papers, records, memoranda, etc., and/or commodities bearing upon the amounts of taxes payable and to secure any other information

directly or indirectly concerned in the enforcement of said sections.

§ 2547. *Taxes Imposed in Addition to Other Taxes.*—The license tax or taxes imposed by sections 2521 to 2554 shall be in addition to all other licenses and taxes levied by law, as a condition precedent to engaging in any business, or doing any act taxable thereunder.

§ 2548. *Sections Independent—Taxes to Be Paid under Protest; Suits for Recovery.*—If any clause, sentence, paragraph or part of sections 2521 to 2554 shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said sections, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of sections 2521 to 2554 or any part thereof: *Provided,* That the collection of the license taxes imposed under the provisions of said sections shall not be stayed or prevented by any injunction, writ or order issued by any court or judge thereon. In all cases in which any license or tax is required to be paid hereunder by any person, firm or corporation and the Tax Commission shall claim the payment of the taxes so assessed, or shall take any step or proceedings to collect the same, the person, firm or corporation against whom such license taxes are charged, or against whom such step or proceedings shall be taken, shall, if he conceives the same to be unjust or illegal for any reason, pay the said taxes notwithstanding, under protest, in such funds and monies as

the South Carolina Tax Commission shall be authorized to receive, and upon such payment being made said South Carolina Tax Commission shall make proper note that the same was paid under protest and notify the State Treasurer that such taxes were paid under protest; that the person, firm or corporation so paying said license taxes may at any time within thirty (30) days after making such payment, but not afterwards, bring an action against the said South Carolina Tax Commission for the recovery thereof in any court of competent jurisdiction and/or in proper cases in the Federal courts and if it be determined in said action that such taxes were wrongfully and illegally collected for any reason owing to the merits, then the court before which the case is tried shall certify of record that the same were wrongfully collected and ordered to be returned with interest thereon at the rate of four (4%) per centum per annum. Whereupon the Tax Commission shall issue its warrant upon the State Treasurer for refunding the taxes and interest so paid, which shall be paid in preference to other claims against the Treasury.

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§ 2552. *Fee for Issuing Duplicate License.*—Whenever any license required under the provisions of sections 2521 to 2554 is lost, misplaced or for any reason necessitates the issuance of a duplicate license, the party to whom such duplicate license is issued shall pay a fee of one ($1.00) dollar for the issuance of such duplicate to the South Carolina Tax Commission which fee shall be turned in to the State Treasurer as other funds collected by the Tax Commission.

Act of October 9, 1940, c. 787, 54 Stat. 1059:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) no person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940 (U. S. C. 1940 ed., Title 4, Sec. 13).

SEC. 2. (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to in-

come or receipts received after December 31, 1940 (U. S. C. 1940 ed., Title 4, Sec. 14).

SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy (U. S. C. 1940 ed., Title 4, Sec. 15).

SEC. 4. The provisions of this Act shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area (U. S. C. 1940 ed., Title 4, Sec. 16).

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 619.—October Term, 1941.

Walter G. Query, John P. Derham, and John G. Richards, as Members of and Constituting the South Carolina Tax Commission, Petitioners,
vs.
United States of America, Major General Henry D. Russell, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, South Carolina.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 1, 1942.]

Mr. Justice Black delivered the opinion of the Court.

A statute of South Carolina imposes a license tax for the privilege of selling tobacco products, playing cards, soft drinks, and other enumerated articles.[1] The United States and two Army officers brought this suit against the members of the South Carolina Tax Commission to enjoin enforcement of this statute with respect to activities of United States Army Post Exchanges located within the state. The bill alleged that post exchanges are instrumentalities of the United States, operating as voluntary unincorporated organizations under the direction and supervision of the United States Army and in accordance with rules and regulations promulgated by the Secretary of War; that the respondents had ordered that the tax be applied to the purchase and sale of commodities by the exchanges; that enforcement would inflict immediate and irreparable damage for which the complainants were without any plain, speedy, and efficient remedy in the courts of South Carolina; that the Congressional consent given by a recent federal statute (54 Stat. 1059) for the imposition of certain kinds of state taxes within "Federal areas" did not extend to the im-

[1] Code of Laws of South Carolina (1932) Vol. II, Sections 2527-2557.

position of taxes on the purchases and sales of commodities by post exchanges; and that the threatened application of the South Carolina statute would interfere with the activities of the United States Government and would be repugnant to the Constitution of the United States. The respondents' answer admitted the threatened enforcement and the absence of remedy in the South Carolina courts, but denied that post exchanges are instrumentalities of the United States and that application of the statute to them would be repugnant to the United States Constitution. With respect to the federal statute referred to in the complaint, the answer stated: "... no consent of Congress is necessary to permit the State to levy its lawful tax ....., the territorial immunity having been removed by Public Act No. 819, 76th Congress."

A Federal District Court of three judges, satisfying the requirements of Section 266 of the Judicial Code,[2] heard the case and granted the injunction sought by the complainants. 37 F. Supp. 972. The opinion accompanying the decree stated, however, that the three judges were of the view that a district judge alone had exclusive jurisdiction to pass upon the case; and that the decree should therefore be considered "not as the decree of a three-judge court, but as his decree, from which appeal lies to the Circuit Court of Appeals and not to the Supreme Court." Nevertheless, all three judges signed the decree "so that in the event it should hereafter be determined that the case was one for three judges under the statute, an appropriate decree will have been entered." 37 F. Supp. 972, 977. The Circuit Court of Appeals, of the same view on the question of jurisdiction, granted an appeal and affirmed. 121 F. 2d 631.

If no more than a question of construction of a federal statute had been involved, there would have been no necessity for a three-judge court pursuant to Section 266. *Ex parte Buder*, 271 U. S.

[2] 28 U. S. C. § 380. This section provides in part: "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute ... shall be issued or granted ... unless the application for the same shall be presented to ... and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. .... An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying ... an interlocutory injunction in such case."

461, 466-467. As a basis for its conclusion that a court of one District Judge was the appropriate forum here, the District Court stated that the "question involved is whether under the provisions of Public Act No. 819, 76th Cong., 3d Sess., . . . the taxes imposed by . . . the State Statute, are applicable to and collectible from the United States Army Post Exchange at Fort Jackson, Richland County, South Carolina."[3] And both courts below thought that disposition of the case required only a determination of the status of post exchanges within the meaning of the federal statute. 37 F. Supp. 972, 973, 977; 121 F. 2d 631, 632. But the complainants sought to restrain the state officers from enforcing the state statute upon the ground of the unconstitutionality of the threatened application. Not only was unconstitutionality the ground asserted by the complaints for the relief sought, but it appears that the relief awarded was predicated on the same ground. Cf. *Wilentz* v. *Sovereign Camp*, 306 U. S. 573, 576.

For the federal act so far as here relevant merely declares that "no person shall be relieved from liability" for certain State taxes "on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area." A proviso adds that the "Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof." The complainants, asserting that the post exchange is a federal instrumentality to which the statutory consent does not apply, rest their entire case upon a non-statutory ground: the immunity from state taxation which they contend must be given, under the Constitution, to the post exchange as an instrumentality of the United States. And notwithstanding its assertion that only the meaning of the federal statute was involved, the District Court nevertheless found it necessary to include in the opinion accompanying the decree a statement that the threats and attempts to enforce the State statute "constitute an interference with the activities of the United States, and are unconstitutional."

[3] There was a stipulation between the parties that if the complainants should prevail with respect to the post exchanges at Fort Jackson, the relief granted should be applicable to certain other post exchanges, ships' stores, and officers' clubs. Both courts below proceeded on the assumption, which we accept here, that all of these organizations were located in "Federal areas." To this extent, if any, that this assumption is incorrect, Public Act No. 819 has no relevance whatsoever.

Here a substantial charge has been made that a state statute as applied to the complainants violates the Constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to Section 266. *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10; *Ex parte Bransford*, 310 U. S. 354, 361. And this is not, like *Phillips* v. *United States*, 312 U. S. 246, a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize. The complainants in this case sought interlocutory and permanent injunctions against "the enforcement, operation, or execution" of a "statute of a State"; they sought to restrain the action of officers "of such State in the enforcement or execution of such statute"; and their attack was based entirely "upon the ground of the unconstitutionality of such statute."

Since there was such complete satisfaction of the conditions which make Section 266 applicable, the cause was a proper one for a three-judge court and appeal did not lie to the Circuit Court of Appeals. But a direction by us to the Circuit Court of Appeals to dismiss the appeal which the petitioners brought to it would, without more, terminate the litigation. For the time within which a direct appeal might have been brought to this Court under Section 266 has elapsed. In the present circumstances, however, we think the petitioners' right to such an appeal should be preserved. *Cf. Phillips* v. *United States*, *supra*, 254. The judgment below is therefore vacated and the cause remanded to the district court for the entry of a fresh decree from which a timely appeal may be taken if the petitioners so desire.

It is so ordered.

A true copy.

Test:-

Chief Supreme Court, U. S.